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No. 84-

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

EMORY WORTH BROWN, JR., Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Emory Worth Brown, Jr.
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Petitioner, Pro Se

VOLUME I

QUESTIONS PRESENTED

1. Whether the intent of the Congress in formulating the 18 U.S.C. 208 Conflict of Interest standards was to establish a de minimis guideline in Section 208(b) to preclude prosecutorial application to:

(a) acts in which the financial interest of the government official is "not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer;" and

(b) acts in which the financial interest is "too remote or too inconsequential to affect the integrity of Government officers' or employees' services;

in consonance with the direction accorded and exceptions to an offense noted in 18 U.S.C. 208(b)?

2. Whether there is a "substantial financial interest" as applied in the statutory provisions of 18 U.S.C. 208(a) sufficient to sustain a conviction for conflict of interest when no profit motive is involved and no profit is received in a minor transaction between a Naval officer and the Navy or any Government Officer and the Government in a procurement initiative designed to generate a substantial return on investment to the Government and for which such return is achieved and officially cited as having "contributed directly to the personnel stability upon which the overall combat readiness of the U.S Navy must depend."

3. Whether the determination of receipt of "anything of value for himself" as a required element for the

violation asserted in 18 U.S.C. 201(g) in defining acceptance of a gratuity is intended to include reimbursement of expenses for materials and resources employed in support of a Government project which produces economic benefits to the Government and for which no profit or financial gain accrued to the individual?

4. Whether the acceptance of reimbursement for out-of-pocket expenses by a Government officer in support of an official act is a per se violation of the statutory provisions of 18 U.S.C 201(g) against "accepting anything of value for himself" when the transaction does not involve personal profit or gain?

5. Whether there is a distinction between "payment for services with

beneficial gain to the individual" and "reimbursement for project related expenses when no beneficial gain accrues" in defining "receipt of a thing of value" as a violation of the statutory provisions against acceptance of a gratuity under 18 U.S.C. 201(g).

6. Whether a District Court charge to the jury explaining the gratuity statute under 18 U.S.C. 201(g) in response to a written question from the jury is improper where not supported by the evidence or where it incorrectly states the law as proscribing receipt of the alleged gratuity "as a result of" an official duty as opposed to the statutory provision "for, because of, or in exchange for" an official duty leading the jury to the only possible technical conclusion

that any type of contractual arrangement between a Government officer and an individual in which reimbursement is involved while performing an official act is a statutory violation?

7. Whether a conviction for an alleged violation of 18 U.S.C. 201(g), accepting a gratuity, can stand where there is absolutely no evidence that defendant performed any "official act for, because of, or in exchange for" any unlawful compensation?

8. Whether the Federal Courts of the United States, in violation of the due process requirements of the Constitution, are permitted to affirm a conviction based upon a fact situation that is clearly not true and not

supported by the record of the trial and by assigning to the defendant admissions of guilt that did not occur as to elements of the charges?

9. Whether the holding of the United States Court of Appeals for the Ninth Circuit that "when charged under 18 U.S.C. 201(c), a defendant is on notice that he must defend against the lesser-included offense defined in section 201(g)" as asserted in United States v. Raborn, 575 F.2d 988 (1978) is substantial and intended to permit the Government to employ such precedent so as to manipulate the adversarial process to obtain a conviction against an unknowing defendant and whether this is considered Justice in the spirit of the law?

10. Whether the conviction by a lay jury unfamiliar with military operations of an officer in the Armed Forces who explicitly conforms to the direction of his superior officers in performing a joint commercial-military operation can be upheld when a violation of those orders would result in serious contractual consequences for the Government and potential charges against the officer and when such direction would not be construed in a military proceeding as a statutory violation.

TABLE OF CONTENTS

	Page
Table of Authorities	xi
Opinions Below	2
Jurisdiction	2
Constitutional Provision Involved .	2
Statutes involved	2
Statement of the Case	4
Reasons for Granting the Writ . . .	30
1. The decision below has caused a split of authority in the circuits resulting in inconsistent precedent with respect to the guidelines of applying the lesser included offense of accepting a gratuity under 18 U.S.C. 201(g) when the original charge is bribery under 18 U.S.C. 201(c) and with respect to avoiding the judicial danger of fostering a compromise verdict by presenting both charges of bribery and gratuity to the jury contrary to the interest of justice and Constitutional due process . . .	30
2. Precedent has been generated by the case in point that broadens the application of 18 U.S.C 201, on conflict of interest, to	

encompass virtually any transaction between a Government officer and the Government in which the officer is personally involved, even when there is no personal profit and the Government realizes a significant economic gain 47

3. The decision below affects the relationships between all government employees and the commercial sector such that efficiency and initiatives to enhance economic benefits to the Government will be suppressed out of fear to take any innovative action lest the individual be charged and convicted of the slightest technical violation of the statutory provisions of 18 U.S.C. 201(g) and 18 U.S.C. 208(a) as interpreted by a prosecutor and at his discretion 56

4. Contrary to the Constitutional provision asserted in the Fifth Amendment providing for due process of law, the United States Court of Appeals for the Fourth Circuit affirmed convictions for acceptance of a gratuity and for conflict of interest based on erroneous assertions that the Defendant had conceded the elements of guilt, had profited on transactions with the Government and had undercharged a motion picture company for flight hours flown violating

Navy directives when the trial record is absolutely void of substantiation and presents undisputed and overwhelming evidence to the contrary 59

Conclusion 65

VOLUME II - APPENDIX

Appendix A Opinion and Judgment of the United States Court of Appeals for the Fourth Circuit . . 1a

Appendix B Order of the United States Court of Appeals for the Fourth Circuit Denying Rehearing . . . 19a

Appendix C Petition for Rehearing en banc by the United States Court of Appeals for the Fourth Circuit 21a

VOLUME III - APPENDIX

Appendix D Report of the United States Navy Board of Inquiry convened in the case of Commander Emory Worth Brown,Jr. . 99a

Appendix E Constitutional and Statutory Provisions . 114a

Appendix F Official Reports of Officer Fitness 120a

TABLE OF AUTHORITIES

CASES CITED — Page

Grassetti v. Weinberger,
408 F.Supp 142 (N.D.C. 1976) . . . 49

United States v. Brewster,
506 F.2d 62, 68 34,35
38,39

United States v. Conlon,
481 F.Supp. 654, 667 (E.D.C.
1979) 49

United States v. Harary,
457 F.2d 471, 477 34,35

United States v. Evans,
572 F.2d 455, 480 (5th Cir.) cert.
denied, 439 U.S. 870 (1978) 55

United States v. Raborn,
575 F.2d 688 (9th cir. 1978). . . . 42

STATUTES CITED

18 U.S.C. 201(c) 2,16
30,38
47,60

18 U.S.C. 201(g) 3,5
26,30
38,47
61

STATUTES CITED (continued)

	Page
18 U.S.C. 208(a)	3,5 25,26 30,47 49,54 56,60
18 U.S.C. 208(b)	4,47 49,64 54,56 59
28 U.S.C. 1254(1)	2
28 U.S.C. 1291	2

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No. 84-

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United States of America, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
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Petioner, Emory Worth Brown, Jr., petitions this Court for a writ of certiorari to review the Judgment and Decision of the United States Court of Appeals for the Fourth Circuit affirming the judgment of conviction against the Petitioner.

OPINIONS BELOW

The Opinion of Court of Appeals was entered on 2 August 1984 (A. 1a). Petitioner's Petition for Rehearing was denied on 21 September 1984 (A. 19a). No Opinion of the District Court ensued.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1) and Section 1291.

CONSTITUTION PROVISION INVOLVED

U. S. Constitution, Amendment V:

> Nor shall any person ... be deprived of life, liberty, or property, without due process of law ...

STATUTES INVOLVED

Title 18, United States Code:

> 201. Bribery of public officials
> (c) Whoever, being a public official ... directly or indirectly, corruptly asks, demands, exacts,

solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

(1) being influenced in his performance of any official act;

...

Shall be fined not more than $20,000 ... or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

(g) Whoever, being a public official ... otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official acts performed or to be performed by him;

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

Title 18 United States Code:

208. Acts affecting a personal financial interest.

(a) Except as permitted by subsection (b) hereof, whoever, being an officer ... of the executive branch ... participates personally and substantially as a Government officer ... through decision, approval, ... rendering of advice, investigation, or

> otherwise in a judicial or other proceeding ... or other particular matter in which he ... has a financial interest -
>
> Shall be fined not more than $10,000, or imprisoned not more than two years, or both.
>
> (b) Subsection (a) hereof shall not apply (1) if the officer ... first advises the Government official responsible for appointment to his position of the nature and circumstances of the ... proceeding ... or other particular matter and receives in advance a written determination made by such official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer ... or (2) if, by general rule or regulation published in the Federal Register, the financial interest has been exempted from the requirements of clause (1) hereof as being too remote or too inconsequential to affect the integrity of Government officers' or employees' services.

STATEMENT OF THE CASE

This case presents issues of first impression before this Court with respect to statutory provisions on accepting a

gratuity and conflict of interest under 18 U.S.C. 201(g) and 208(a).

Petitioner was convicted of one count of accepting a gratuity as a lesser included offense of 18 U.S.C. 201 and of three counts of conflict of interest under 18 U.S.C. 208. Of particular note is the substantial denial of Constitutional due process in this action which broadens standards applied to gratuity and conflict of interest to encompass reimbursement of expenses without personal gain as a gratuity and nonprofit transactions for which the Government gained extensive benefit as a conflict of interest.

Complexity of the case mandates detailed development of individual segments and focus on Navy objectives during the timeframe of the acts for which charges were ultimately filed.

Petitioner is a Naval officer tried in Federal Court rather than before a Navy tribunal because of civilian association in a joint Navy and private movie project. No civilian was ever charged in the case. After trial, a Navy Board of Inquiry convened to evaluate findings as to the officer. After three months of hearings, the Navy Board exonerated him of charges of accepting a gratuity and conflict of interest for which he had been convicted, in effect ratifying his actions. The Navy tribunal asserted that he:

> did not benefit personally from the sale of hatch cover tables, for which he was convicted of conflict of interest ... with regard to the conviction of accepting a gratuity, evidence supported the argument that money provided to (him) was in payment for expenses incurred in behalf of the squadron and the movie company ... the payment in no way constituted a gratuity.

The Navy Board asserted that the FBI and NIS reports, which "were the basis for

the Government's case," were:

> in the absence of other evidence, very damning of (him) but when considered with all the relevant facts in the case, the Board found these investigations filled with unsubstantiated allegations, many of which were based on rumor and innuendo rather than good objective evidence.

A

The Navy from 1978 to 1980 was undermanned and facing morale problems. Official Naval Operations objectives, which served as direction for the Petitioner as Commanding Officer of a fighter squadron, were set forth in a "Memorandum for all Flag Officers, Unit Commanders, Commanding Officers and Officers in Charge" dated 11 December 1979. Navy objectives applicable to the instant case are:

> ... Many objectives are carryovers. A common theme running through all is the need to run the Navy right, so we attract and retain talented officers and petty officers, and use our scarce resources to the best possible effect against an increasingly capable Soviet Navy. I have deliberately limited the

objectives to those which I consider warrant personal attention of the Navy's uniformed leadership:

CNO-1: Continue pressure toward resolution of the retention problem. ... our results are unacceptably below goals. Manning up the Navy must remain our highest order of priority. ... Keep the attention of the entire chain-of-command focused on the retention problem ... participate aggressively ... work aggressively.

CNO-4: Provide emphasis on people programs requiring special attention ... Continue to improve habitability for shipboard personnel ... Continue to pursue additional resources to fund our personnel support programs (such as morale ...).

CNO-7: Improve perceptions of the Navy ... objectives listed below are all important in their own right. At the same time they collaterally contribute to others' impression that the Navy knows where it is going, and is proceeding there in a sensible manner ... Keep improving the appearance of our people and installations ... Further improve base appearance to "look like the first class Navy that we are."

/s/ T. B. Heyward
Admiral, U.S. Navy
Chief-of-Naval-Operations

B

Petitioner was Commanding Officer of

VF-84, a fighter squadron embarked in USS NIMITZ and assigned when disembarked to Naval Air Station Oceana, Virginia. In 1978, he arranged with movie producer Peter Douglas and the Navy for a major feature length film developed around his Air Wing and the NIMITZ. The Navy eagerly accepted the proposal asserting that the movie would be of great benefit to Navy recruiting and retention objectives:

> VF-84 solicited Commander Naval Air Force, Atlantic Fleet involvement in the filming of the major motion picture "The Final Countdown" and dedicated extraordinary effort towards directing, coordinating and flying aerial scenes. This CNO Sponsored Project will be the most outstanding Navy Recruiting Instrument in recent times and will be seen worldwide. Squadron participation in the film is a major factor in retention and recruiting.
>
> (Atlantic Fleet Golden Anchor Award under signature of Commander-in-Chief, Atlantic Fleet)

As the project developed, Petitioner took responsibility for rewriting the script, coordinating aerial photography

and flying the F-14 photo plane. The aerials were filmed during a three week period in June 1979 at Key West.

The Navy and the production company agreed to a specified amount of F-14 time to be charged to the film at a rate of $4,000 per hour. An escrow fund was established to cover those flights, the flights of other support aircraft and administrative costs. The F-14 allocation was set at 30 hours by the Navy movie project officer and the Commander, Naval Air Forces, Atlantic Fleet.

Petitioner deployed one half of his squadron to Key West taking six airplanes from Oceana. In a dedicated effort to remain within budget constraints, he directed that his squadron pilots account for the specific flight time that was actually involved in the movie and separately for all other flight time that

would be justified as pilot combat readiness training. He timed the aerial scenes each night as the film from the previous day was reviewed. When difficulties with equipment, expertise and inexperience forced additional shooting, he sent an official Naval message to his commander requesting authority to extend the movie flight hour allocation from 30 to 35 with a 65 hour training extension. Authorization was granted by Naval message. He subsequently reported 32.5 flight hours dedicated to the movie.

Total flight time during the three week project was approximately 150 hours, including: cross-country flights between Oceana and Key West required for transit of fighters to and from the project site; exchange of aircraft daily between Oceana and Key West for maintenance and crew rotation; weather reconnaissance; combat

readiness training; and pilot proficiency. Flight time between Oceana and Key West one way was 2.4 hours. Had transit flights been chargeable to the production, the transfer of the six aircraft required for training and movie support to and from the site only one time would have totally displaced the 30 hour allocation with no time left for filming.

Petitioner was simultaneously tasked to prepare his squadron for imminent departure onboard USS NIMITZ in July for training and a nine month deployment to the Mediterranean and the Indian Ocean in September. As the movie was by necessity executed in addition to basic requirements of the squadron training plan, all pilots were exposed to training requirements concurrent with movie operations.

As coordinator for the aerial filming and as squadron Commander responsible for

the combat readiness and morale of his men and the public image of the Navy, Petitioner upgraded the appearance and habitability of his spaces onboard USS NIMITZ and at the Naval Air Station in accordance with CNO objectives. His actions in preparation for filming at both sites were, by arrangement with the producer, to be reimbursed at cost as was other direct project support. Petitioner expended his own funds in execution of this support and upon completion of filming and immediately prior to embarkation aboard NIMITZ, the producer presented to him a check for $5,563.48 to cover expenses. In return, Petitioner presented to the producer a form specifying materials similar to those were used in reconditioning squadron spaces to an amount estimated at the total cost outlays he had made for the project. The form was not a precise

representation of itemized support, but rather a hurried attempt to provide for the producer a rough file record to account for expenditures. The exchange occurred just before deployment and on the day the production company was winding up operations which by necessity accelerated the transaction beyond normal routine.

Subsequently, while enroute to Spain onboard NIMITZ, the Navy Cost Collector advised Petitioner that the producer had challenged certain administrative expenses and directed that he identify any expenditures associated with his squadron. Petitioner briefed his Air Wing Commander and the Captain of the NIMITZ and obtained permission to send a telegram to the producer advising him to honor his payment obligation. Petitioner asserted that the Navy had extended to the producer benefits of use of an aircraft

carrier at no cost and of fighters at the agreed allocation when charges could have been significantly expanded had dedicated accounting to separate training from movie support not been applied. Petitioner and the Captain of the NIMITZ were committed to the Navy to minimize potential for adverse publicity following a highly successful movie effort and in anticipation of a unique personnel recruiting film release. Both were concerned that the media would misinterpret movie charges and repeat previously run articles denouncing the use of cross country flying as official training flights. Petitioner sent the telegram via open Naval communications channels and the Western Union. Petitioner then responded to his direction from the Commander, Naval Air Forces, to itemize expenditures. Upon arrival in Spain, Petitioner called the Navy Cost Collector

to verify receipt of the correspondence and advised him of the telegram to the producer and of his expectation that logic would prevail and payment of obligations would follow.

Subsequently, the Government formed a theory on circumstantial evidence developed with respect to flight hours flown, receipt of the check and the telegram and charged the Petitioner with bribery under 18 U.S.C. 201(c). The Government contended that the petitioner undercharged the movie company for flight hours by not charging all flight time during the three week project; that the check from the producer to the Petitioner was exchanged for this action; and that the telegram was extortionary in support of the bribery allegation. The only references made to the telegram were those by the Petitioner to the Navy Cost Collector and to the FBI

agent. The telegram could not be recovered either by the Petitioner or the Government and was not produced at trial.

C

Petitioner had continuously engaged in self-help projects to upgrade squadron office and living spaces in support of Navy objectives to improve morale, public image, quality of life and habitability. His official Reports of Officer Fitness document his efforts and the physical reconditioning of 75 percent of spaces at Naval Air Station Oceana support the extensiveness of his personal involvement in the self-help program. In particular, he added nautical furnishings that he had personally constructed or purchased to the squadron spaces and to the office of the Navy Career Counselor. As a weekend hobby he made hatch cover tables mostly for use by Naval units as departure gifts for

their commanders. Over a five year period, he made 21 hatch cover tables, six of which were placed in his squadron.

In a special effort to create an environment to support the current recruiting theme, Petitioner used his hatch cover tables, nautical lamps and framed nautical prints in the squadron. Exceptional success of the effort was proven as his squadron won the Atlantic Fleet Golden Anchor Award for best personnel recruiting and retention program in the Fleet:

> This award attests to significant achievements obtained through command involvement, concern for individuals and recognition of the priority associated with retention efforts during FY 1979. By attracting and retaining quality personnel you have contributed directly to personnel stability upon which the overall combat readiness of the U.S. Navy must depend. ..
>
> The Career Counselor's office is designed to support the Navy theme of "It's not just a job, it's an adventure" through nautical decoration. This office is considered to be the most important facility in the

> command and has been given the highest priority in upgrade and rehabilitation of squadron office spaces. The office is spacious and is specifically laid out to provide privacy and an atmosphere of comfort in a nautical setting that belies the tight "steel grey ship compartation" characteristic of the thoughts of our enlisted personnel when they consider a future in the Navy. A permanently built wood paneled partition decorated with a large "WELCOME ABOARD" ship plaque flanked by brass ship's lanterns greets the career candidate as he enters the office. ... he passes by old recruiting posters framed in quality custom picture frames and enters a wood paneled family room environment with two comfortable leather chairs, hatch cover tables fashioned from hatches of old liberty ships, nautical lamps and artifacts and framed prints from the days of sail bracketed by candle sconces. The nautical decor creates an atmosphere that shows the pride associated with the early days of seamanship and instills in the career candidate a perspective on Navy life that tends to break down conventional barriers.

The Government charged the Petitioner with seven counts of conflict of interest for participating in the decision to purchase six hatch cover tables and one nautical lamp using Navy self-help funds.

Four counts were in association with a local merchant through whom tables had been sold to the Navy; but the jury acquitted on these counts based upon the merchant's assertion at trial that the payment received for the tables was applied in total toward payment of a separate Navy account receivable for the framed prints employed by Petitioner's squadron. Petitioner had in fact contributed the four tables to the Navy at his own financial detriment without reimbursement even for cost of materials.

Petitioner was convicted of three counts of conflict of interest for two hatch cover tables and one nautical lamp for which he contended he received only cost of materials and no profit. His conviction was affirmed on Appeal on the basis of the FBI assertion that Petitioner admitted he had made a profit, a statement

subsequently discredited under cross examination of the agent, by other trial testimony and by the Navy Board.

D

The Government brought charges on sixteen counts of theft of Government property and false statements; however, the Petitioner had properly and extensively accounted for the subject matter and the jury acquitted on all counts.

E

Investigation of the case had been initiated in July 1980, one year after completion of filming. Petitioner became aware of the investigation in November 1980 while on special assigment to Saudi Arabia and immediately upon his return to the United States initiated an interview with the FBI. He appeared without counsel. The FBI statement with respect to Petitioner's disclosures as to the case

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generated by this interview was unsigned and was subsequently and substantially refuted. Petitioner presented names of witnesses to corroborate his innocence to the investigating agent, including: the Captain of the NIMITZ; the squadron maintenance officer assigned to account for movie related resources; the squadron movie project officers most intimately familiar with flight hour accounting agreements; the Navy Public Works official under whose auspices Petitioner's space renovation projects had been developed over a ten year period; and the personnel who had specifically assisted in upgrading squadron spaces in support of the movie project. None were interviewed by the Government. Petitioner also requested a polygraph test to confirm his assertions of innocence, but the Government refused. During the next two years,

Government action on the case was essentially dormant.

In October 1982, the Government notified counsel for the petitioner of intent to pursue an indictment and entered into plea negotiations with counsel. Petitioner advised counsel that he would not accept plea arrangements and of his intent to present his case before the Grand Jury in an effort to preclude indictment. Petitioner expressed extensive concern that his father, who had been subjected to neurosurgery, would not survive the trauma of publicity accompanying an indictment. Petitioner also had, after two years of uncertainty during which his Naval career was in effect terminated and his financial resources depleted, reached a level of despondency so evident to counsel that he was advised to acquire psychiatric assistance to preclude imminent suicide. On the

eve of the Grand Jury appearance, counsel advised the Petitioner that: counsel could not be present before the Grand Jury; the conflict of interest statute was so worded that the prosecution could gain an indictment automatically; that there was no defense to conflict of interest charges; and that Petitioner would not be allowed to present his version of the events, but would only be allowed to respond to Government questions. Counsel then advised Petitioner that the Government had negotiated for a single count of conflict of interest, contrary to the direction given by the Petitioner against any plea agreement, and that a decision would have to be made in less than ten minutes. Counsel asserted that he was not allowed to recommend a course of action, but he left no option and his guidance was firm that this was the only way to preserve Petitioner's

father from exposure to adverse publicity that would surely attach. Under the pressure applied and the level of emotional stress that prevailed, Petitioner elected to terminate further damage. He accepted the Government proffer to enter a guilty plea to a single count of conflict of interest under 18 U.S.C. 208(a). Of note, counsel had never before defended in a criminal case.

Petitioner entered the plea in November 1982, but the Court did not accept, electing to take it under advisement. Petitioner then withdrew the plea in January 1983, asserting his innocence. The Government, on 20 January 1983, presented seventeen and seven count indictments in two separate actions and renewed the conflict of interest charge subject of the negotiated plea. That charge was then dropped at trial to avoid an unresolvable

conflict of a bribery charge on the same subject matter.

F

Petitioner was convicted of one count of accepting a gratuity under 18 U.S.C. 201(g), a lesser included offense of the bribery charge, and three counts of conflict of interest under 18 U.S.C 208(a) with judgment entered on 26 May 1983. On each of four counts, Petitioner was sentenced to pay a $5,000 fine and to serve one year in prison, incarceration suspended, and to serve three years of probation. Appeal was noted to the Fourth Circuit on 1 June 1983.

G

Subsequent to the District Court Trial, the Secretary of the Navy directed that a Board of Inquiry be convened as to the Petitioner based upon his Federal

convictions. The Navy Board convened on 22 August 1983 and conducted evidentiary hearings and deliberations until 7 November 1984. The Navy Board (A. 99a-113a) asserted in part:

> Commander Brown admitted that he received the check (the alleged gratuity) from the company which produced the movie 'The Final Countdown'. His position was that he did receive the check, but that he used it as reimbursement for his out-of-pocket expenses in the production of the movie and in the performance of his duties to improve and maintain his squadron spaces. ... The respondent stated that he never realized any personal gain or profit in any of the incidents and never intended to make such gain. His position was that his intentions were always to improve morale of his personnel and readiness of his command and to promote a good public image for the Navy through the movie. Commander Brown stated that he believed that under the Navy Judicial System he would not have been convicted because the true nature of his intentions and responsibilities as a Commanding Officer would have been understood. His position was that the Federal convictions were based on technical concepts of violation of the law which did not consider that he had unselfish motivations and made no personal gain. Commander Brown denied any improper

intent in any documents or statements which did not accurately reflect the nature of expenditures and reimbursement. He admitted inaccuracies, but denied dishonesty. Commander Brown's position was that he displayed the highest levels of good leadership in his unselfish and zealous devotion to the welfare of his subordinates, the combat readiness of the command and the broader goals of the Navy. The evidence presented to the board supported, in every instance, Commander Brown's version of the events.

The board acknowledges that Commander Brown engaged in questionable activities which were in violation of Navy directives. However, it is believed that Commander Brown is, basically, an honest man who always acted in the best interests of his subordinates and unit organizations. There is no evidence that Commander Brown profited monetarily by his actions. By using more orthodox procedures the same beneficial results might have been achieved but with much greater expenditure of time and, possibly, greater expense.

It is the opinion of the board that the Executive Officer of VF-84, when Commander Brown was Commanding Officer, and other officers senior to Commander Brown in the chain of command, did not follow a logical course of corrective action as provided by the guidelines of SECNAVINST 5370.2G, but rather pursued a course of action that ultimately allowed the matter of a

> lack of inventory custody cards and return of Navy property to the squadron to develop into a case that destroyed a front-running officer's career and has the potential for needless adverse publicity to the Navy.

H

The case was argued before the Fourth Circuit on 8 March and affirmed on 2 August 1984 (A. 1a-18a). A Petition for Rehearing (A. 21a-98a) noted on 17 August was denied on 21 September 1984 (A. 19a-20a). The Navy Board of Inquiry succeeded the trial and was not addressed in brief, nor presented before the Fourth Circuit although the subject was addressed during oral argument. The Navy Board heard 34 witnesses, including the NIMITZ Captain and Air Wing Commander, who were unavailable for trial due to Navy commitments, and 13 others who were at trial but not permitted to testify, and reviewed 87 affidavits among 167 evidentiary documents.

REASONS FOR GRANTING THE WRIT

1. The decision below has caused a split of authority in the circuits resulting in inconsistent precedent with respect to the guidelines of applying the lesser included offense of accepting a gratuity under 18 U.S.C. 201(g) when the original charge is that of bribery under 18 U.S.C. 201(c) and with respect to avoiding the judicial danger of fostering a compromise verdict by presenting both charges of bribery and gratuity to the jury contrary to the interest of justice and Constitutional due process.

The indictment involved two separate and distinctly opposed counts under 18 U.S.C. 201(c) and 208(a) on the subject matter for which the Petitioner was ultimately convicted of a lesser included offense of accepting a gratuity, a distinctly different third theory under 201(g). Count one charged bribery under 18 U.S.C. 201(c)(1):

> ... being an officer ... of the United States Department of the Navy ... corruptly did ... receive ... a thing

> of value, to wit: $5,563.48, in return for ... being influenced in the performance of an official act in respect to accounting for the number of flight hours which should be charged to ... a private movie maker engaged with ... Navy assistance in filming the movie "The Final Countdown."

Count seventeen charged the Petitioner with a violation of 18 U.S.C. 208(a) involving the same subject matter:

> ...being an officer ... of the United States Department of the Navy ... unlawfully did participate personally and substantially in the acquisition of business worth in excess of $5,000 for Binnacle Enterprises from the Aspen Production Company, a private movie-maker engaged with the United States Navy in the filming of "The Final Countdown," then knowing that he ... has financial interest in Binnacle Enterprises.

The Government dropped count seventeen to avoid the controverted theories and conceded in opening statement that the bribery theory was, at best, circumstantial requiring the jury "to draw a reasonable inference" of bribery. On testimony of seven witnesses (A. 26a-55a), including

the Commander, Naval Air Forces Atlantic Fleet (A. 49a-55a) that Petitioner was conforming explicitly to Navy direction to charge the movie company no more than the agreed upon 30 hour commitment and that Petitioner officially requested and received from his superior permission to charge for an additional 2.5 hours (A. 30a-33a), the jury in acquittal absolutely rejected the Government theory and found as a fact that there was no bribery.

Accordingly, inasmuch as the Government sought to prove a bribery case, and only resorted to a lesser included offense at the last moment to avoid certain defeat on the bribery charge, the Government failed to introduce proof into the record of threshold evidence necessary to support the gratuity charge.

Petitioner testified without dispute and with extensive witness support that he

received the check from the producer in reimbursement for monies paid out of his own pockets for improvement of Government spaces and for support resources in conjunction with the movie. He had been directed to "cooperate fully" with the production company and, in the absence of other guidance, he provided all assistance considered reasonable in his discretion as squadron Commanding Officer including support payments for the film for which reimbursement was anticipated and received. There was absolutely no evidence that the compensation was unlawful or paid for services rendered or other than reimbursement for expenses or that Petitioner realized a profit. On the contrary, the record contains undisputed evidence that Petitioner used his own funds to pay for construction of permanent fixtures that remain today in Government spaces (A. 63a-83a).

In United States v. Harary, 457 F.2d 471, 477, the D. C. Circuit held that:

> If the court can conclude on the basis of the evidence presented that no reasonable man, weighing solely the evidence in light of the applicable law, could find the defendant guilty of the lesser offense and at the same time not guilty of the greater offense, no disputed factual element could be present which would compel the court to give the lesser included offense instruction. Accord United States v. Brewster, 506 F.2d 62, 72-73, n. 26.

A fortiori, where the record is such, as in the instant case, that a finding of not guilty by the jury as to the greater offense of bribery leaves the record uncontradicted as to the absence of any remaining evidence to support the finding of the lesser included offense of gratuity, then Petitioner's conviction for accepting a gratuity cannot stand on such record. The Court in Harary reversed the conviction, inter alia, asserting that the District Court should never have submitted

to the jury both the bribery and gratuity offenses, but only the bribery offense on that record. Harary, at 480.

The Court in Brewster, stated:

> ... proof on the element or elements differentiating the two crimes (bribery and gratuity) must be sufficiently in dispute so that the jury may consistently find the defendant innocent of the greater and guilty of the lesser included offense." 506 F.2d 62 at 73-74, n. 26.

The Court denied the motion for Judgment of Acquittal as to bribery and submitted both bribery and gratuity charges to the jury. While the jury was deliberating, the panel requested clarification in writing regarding gratuity:

> "Could the Court define the essential elements contained in the charge under count 1 in the lesser charge of accepting a gratuity?"

The Court reviewed the first two elements as though they were conclusively presumptive and then the third element:

... The Government would have to prove

> beyond reasonable doubt that the defendant was given money as a result of the performance of an official act. Said another way, that he performed a duty as a Naval officer as required by the Navy for him to do, and that as a result of doing that which he was required to do, he was given the money and he accepted it. Now remember that the Government has the burden of proving by a preponderance of the evidence -- by evidence which would establish beyond reasonable doubt that element as well as the other two elements of that crime; that is, that the defendant was given the money as a result of the performance of an official duty that he was required to do or required to perform as a Navy officer or that he had been ordered to perform as a Navy officer and that he accepted the money. (emphasis added).

Petitioner objected to the charge and the Court agreed that the original charge as to the lesser included offense of gratuity was "a little convoluted", but refused to recharge the jury. Petitioner submits that the original and supplemental charges given the jury were not correct statements of the applicable law and failed to adequately distinguish between

bribery and gratuity. Further, a reading of the charge clearly leaves no option for lawful receipt of reimbursement of expenses or of any transaction between the Petitioner and the movie company even with no profit or personal gain. The interpretation given by the court to the check as "something of value" and dismissed as a conclusive presumption of fact left no room for the jury to consider that "something of value" requires personal gain. If there is no personal gain, as in cost reimbursement in which only the Government gained, the individual could not, by any definition, have received something of value for himself. The Court did not use the term "reimbursement" or acknowledge potential for reimbursement as being outside of statutory provisions for violation or distinguish between "reimbursement of expenses" and "payment for services."

The Brewster Court asserted that the bribery and gratuity statute is not cited "as a model of clarity and nicely drawn distinctions." 506 F.2d 62 at 78. Specifically, the Court wrote as if it had the very case at bar in mind:

> Where the statute does not cause great difficulty for a trial judge, a difficulty which we hold proved fatal to the conviction in this case, is that in addition to the problem of drawing a distinction between one definable offense and innocent conduct, where both offenses are charged, a trial judge must also draw the tripartite distinction between conduct within the defined intent to constitute an offense under the bribery section (c), conduct with the requisite intent to constitute an offense under the gratuity section (g), and conduct with an intent which constitutes no offense at all. The Trial Judge strove manfully -- and judicially -- to make these fine distinctions for the jury. Yet we have found it difficult ourselves, with adequate time to reflect and ponder, to understand the subtle distinctions made in the written text of the instructions. With the advantages of time, a written text, and a modicum of legal learning, we are doubtful if we comprehend fully the Trial Court's explanation of the subtle distinction between guilty under one section,

> guilt under the other, and total innocence. We are certain the jury could not possibly have discerned the boundary lines on the basis of these instructions, and this a jury must be able to do in order to convict a defendant on any charge. Id. at 78.

The Brewster Court found reversible error in the charge of the District Court even where the charge was as per the statutory language, which language exceeds in clarity and correctness the vague and confusing language of the instant Court.

Furthermore, the Brewster Court admonished District Courts and prosecutors in such bribery and gratuity cases to carefully avoid the unique pitfalls presented by such bifurcated charges and their invitation to juries to compromise:

> A note of caution to the prosecution: In future cases before the prosecution asks for charges to the jury under both the bribery section (c) and the gratuity section (g), it should be satisfied that the charge proposed is designed to avoid the pitfalls we have found here. The prosecution might elect the safer

> course of only going to the jury under either the bribery section (c) or gratuity section (g), but not both.
>
> The danger inherent in the situation calling for the trial judge to distinguish sharply among guilt under the bribery section, guilt under the gratuity section, and innocence under either or both, is that the jury is subconsciously tempted to compromise. If the line between the greater and lesser offense is muddy, if the distinction between knowingly accepting an illegal gratuity and cheerfully acknowledging a legitimate campaign donation is dim, then why should not the jury take the "middle ground", i.e., find the defendant guilty of the offense carrying the lesser penalty? This may have happened here. A defendant is entitled to more than a possible jury room compromise, he is entitled to have his guilt or innocence voted up or down on the clearest possible lines of distinction. Id. at 83.

The case at bar is a classic example of a compromise sought and a compromise gained as the Government charged the defendant with seventeen major counts of moral turpitude and "tacked on" seven conflict of interest technical violations subsequent to a plea offer to a single

count of conflict of interest. Of particular note should be the difference in exposure between the initial charge of $10,000 fine and two years imprisonment and the trial charges of $250,000 and 136 Years imprisonment. The Government had no case from the outset or the plea negotiations would have been more demanding. The Government presented no valid evidence to support the major violations and with extensive witness assertions that Petitioner had directed explicit accountability for the items in question; that the Commander, Naval Air Forces had been provided a detailed inventory by the Petitioner; and that all items were properly destined for Government use, the jury rejected all allegations of moral turpitude conduct. In each indictment, the jury elected to convict only on the least substantial offense in a classic representation of jury

compromise - "Where there is so much smoke, there must be some fire."

The Government proffered two opposite theories with respect to the same subject matter, bribery and conflict of interest, and then submitted, in the last instant, a third theory to salvage a conviction by a compromise verdict. And the Government relied upon United States v. Raborn, 575 F.2d 688 (9th cir. 1978), as precedent allowing injection of the lesser included offense theory without presentation of a defense against the charge. Note the trial record (Tr. 1048-1049) from the fourth day of proceedings while Defendant was under cross-examination:

> Q: Okay. Now, when you took the five-thousand dollar check from Peter Douglas, did you consider that to be a gratuity?
>
> A: Not in the slightest. It was reimbursement to me for out-of-pocket expenses.

Q: What is a gratuity? Do you know what a gratuity is?

A: Yes, I know what a gratuity is.

Q: Would you tell us what --

MR. STANLEY SACKS: If Your Honor please, I object to that. He's not charged with accepting a gratuity. he's charged with taking a bribe for -- in exchange for a promise that he would reduce flight hours illegally and improperly. He's not on trial for a gratuity. There's no statute that makes it a criminal offense for him to take a gratuity.

THE COURT: He's on cross examination.

MR. STANLEY SACKS: I understand, Your Honor, but that can be misleading. He's not charged with that.

THE COURT: I think it's within proper bounds.

There was no indication by the Court or the Government that a gratuity charge was forthcoming or that it was a statutory violation or that Defendant should be on notice to defend against a gratuity charge. While it may not be incumbent upon the Court to provide notice, justice

is better served when the adversarial encounter does not prejudicially favor the judicial power. Victory is pyrrhic when gained at the cost of justice and empty when achieved against no opposition. The Court was not reasonably responsive to the objection or to the issue.

The Fourth Circuit dismissed the issue as to the jury charge and the potential for a compromise without addressing the salient point:

> Viewed in total context of the original instruction and the form of the jury's request, and taking into account the discretion reposed in the trial court, this supplemental instruction cannot be found prejudicial. (A. 15a)

Petitioner respectfully submits that the prejudicial effect of the erroneous supplemental charge cannot be dismissed as within the "discretion reposed in the Trial Court" and is actually heightened by the fact that the jury expressed explicit

difficulty with this element of the gratuity charge and asked for clarification. Where that clarification is an incorrect statement of the law and is not representative of the precise language of the statute, the Government cannot claim the Defendant was accorded a fair trial.

Petitioner respectfully submits that the Fourth Circuit was confused by the gratuity issue as indicated by the holding (A. 14a) that there was:

> ...substantial evidence to support the inference that Brown did in fact receive the check "for or because of" either <u>understating the number of hours for which the producer would be charged</u> or gratuitously remaining silent when disclosure of this fact was required by Naval regulations, either of these being "official acts" within the meaning of the statute.

Either of these "official acts" as defined would have constituted bribery and both were not in consonance with testimony presented by the Commander, Naval Air

Forces Atlantic Fleet, and the Navy Cost Collector who confirmed that flight hours were not undercharged (A. 26a-55a). No evidence appears to support an undercharge of flight hours other than circumstantial interpretation by the FBI agent. There was no assertion that Defendant "remained silent" or that "disclosure of this fact was required by Naval regulations." On the contrary, Defendant advised the Navy Cost Collector by Naval message of flight hour charges and obtained authorization.

Petitioner respectfully submits that the sharply different precedent now established between the Ninth and Fourth Circuits convolutes the law further than the previously acknowledged difficulties in interpretation and application of the statutes. In the interest of Justice and proper administration of the law, the Court should take the compromise verdict

potential and the misapplication and misinterpretation of the law as presented in the statutory provisions of 18 U.S.C. 201 under review. The Court should grant certiorari in order to clarify a statute of central importance to the judicial system and to afford the defendant his Constitutional rights to a fair trial.

2. Precedent has been generated by the case in point that broadens the application of 18 U.S.C 208(a), the statute on conflict of interest, to encompass virtually any transaction between a Government officer in which the officer is personally involved, even when there is no personal profit and the Government realizes a significant economic gain.

In formulating the 18 U.S.C. 208 Conflict of Interest standards, the Congress added section 208(b) to provide guidelines as to exemptions from the Act. The statutory language is most significant:

> (b) Subsection (a) hereof shall not apply if ... the interest is not so substantial as to be deemed likely to

> affect the integrity of the services which the Government may expect from such officer ..., or (2) if ... the financial interest has been exempted from the requirements of clause (1) hereof as being too remote or too inconsequential to affect integrity of Government officers' services.

Petitioner respectfully submits that the intent of the Congress was to provide de minimis connotation to the statute so that a Government prosecutor would consider diligently the status of the financial interest involved in a transaction of concern and employ sound prosecutorial discretion to reject an interest that is remote, inconsequential or insubstantial.

Congressional intent is clearly to prohibit financial arrangements between the Government and agents which reasonably can be expected to impact upon the objectivity of honest and fair Government. The Congress intended to exempt in the letter

and spirit of the statute insubstantial or insignificant financial interests:

> Although 208(a) prohibits a Government employee from participating substantially in a matter in which he has any 'financial interest', 208(b) makes clear that insubstantial interests are to be exempted ... Assuming that Congress intended to treat consistently affiliations with a similar potential for influencing an employee's integrity and impartiality, the prohibitions in 208(a) related to employment should not be interpreted to reach insubstantial contacts or connections ... United States v. Conlon, 481 F. Supp. 654, 667 (E.D.C. 1979).

Grassetti v. Weinberger, 408 F. Supp. 142 (N.D.C. 1976) suggests that no conflict of interest existed within the meaning of 18 U.S.C. 208 where the defendants would not have benefitted financially or where the possibility of conflict of interest was too remote.

Commentators expert on 18 U.S.C. 208 have concluded that Congressional intent was not to proscribe insubstantial, insignificant or remote financial interest:

> It is unfortunate that the new Act did not include the word "substantial" immediately preceding "financial interest" in section 208. In the absence of such a statutory term, essentially the same result can and should be reached within the framework of the exemptive provisions. The most important provision is that the interest be a substantial one - meaning that the circumstances of personal interest should raise the possibility that a reasonable man (not necessarily the particular official) would in fact be affected in his official judgment. Perkins, The New Federal Conflict-of-Interest Law, 76 Harv. L. Rev. 1113, 1135 (1963).

The facts that Petitioner's connection with hatch cover tables was a hobby interest, done almost completely on weekends; that involved the making of only 21 tables over a five year period, only a few of which were sold; that Petitioner did not profit from the sales and had absolutely no financial interest in the results of any of these sales; that he never personally gained from any transactions alleged in the counts of which he

was convicted; that the transactions involved were for a cost that was one-fourth of the fair market value of a hatch cover table; and that a knowledgeable witness testified that the tables could not even be produced commercially for the cost asserted, established beyond dispute that Petitioner's conduct did not fall within criminal prohibitions of 18 U.S.C. 208.

Petitioner respectfully submits that the Congress could never have intended that an individual may, with larcenous intent, steal without excuse or justification goods in the amount of $199.00 or less on a Federal reservation and be guilty of a mere misdemeanor, while a Naval Commander could procure for his fighter squadron at prices well below market value and without profit two hatch cover tables built as a weekend hobby and a nautical lamp purchased commercially and

be termed guilty of three felonies.

Petitioner employed his resources and woodworking skills to enhance quality of life of his squadron in direct accord with Chief of Naval Operations objectives. He was reimbursed for costs incurred on three of seven pieces placed in his squadron and gave the remainder gratis to the Navy.

The Fourth Circuit affirmed the convictions asserting that he had conceded making a profit based on the testimony of an FBI agent, which was circumstantial and which was the only evidence of an alleged profit presented at trial:

> Q: And he told you that he made no profit from them, didn't he?
>
> A: At first he told me that.
>
> Q: All right, sir.
>
> A: Then he told me he did make a profit.
>
> Q: Well, the reason he told you, as you say, that he made a profit is that -- well, who pointed out to

him that materials would not count for the purchase price? Who told him -- Well, "If you say you didn't make a profit, your giving materials doesn't count," who told him that.

A: I told him that.

Q: I direct your attention to page -- well, it's page 12 of your notes --

A: Uh-huh.

Q: -- at the top of the page. Your notes are: "Commander Brown indicated he got no profit from the sale of these tables, but when it was pointed out that ma-terials would not count for the purchase price, he indicated that he possibly made a profit on some of the tables." Is that what happened? (emphasis added).

A: That's correct.

This manipulation of facts and semantics to create the illusion of a profit does not comport to a concession as to making a profit.

A transaction void of a personal financial gain or a profit or a benefit to the individual is not a "substantial

interest" as presented in 18 U.S.C 208.

The statutory language of 208(b) specifically addresses the substantiality of the financial interest as to affect on "the integrity of the services which the Government may expect from such officer." Petitioner respectfully submits that the Official Reports of Officer Fitness appended (A. 120a-153a) attest to the fact the integrity of the services by the Government officer in this case has been conclusively proven to be outside of that intended as in violation of the statute and that a closer review of a candidate for prosecution is mandatory to preclude a judicial indiscretion that could remove the highly valued services of an officer from the Government without cause.

The policy in creating and applying the statute should be clear:

The policy objectives which underlie

> conflict of interest laws include the assurance of impartiality, fairness, and equality of treatment toward those dealing with the Government, the elimination of private considerations in public decisions, the efficient and economical operation of Government, the maintenance of public confidence in Government, and the prevention of the use of public office for private gain. Perkins, The New Federal Conflict-of-Interest Laws, 76 Harv. L. Rev. 1113, 1118.

Petitioner respectfully submits that the policy objectives presented and the holding in United States v. Evans, 572 F.2d 455, 480 (5th cir.) that the purpose of conflict of interest laws is to eliminate clouded judgment by Government officers, preferential treatment, inefficient management and the temptation to act contrary to the best interests of the Government are precisely on point and that guidelines as to application of the law should be defined to preclude prosecution of a Government officer whose actions are clearly favorable to the Government, are

cited as improving efficiency and as exceptionally meritorious resource management and are of no personal gain.

The Petitioner respectfully submits that review of the statutory provisions of 18 U.S.C. 208 is both necessary and timely. Certiorari should be granted to provide guidelines to the essentially unused conflict of interest provisions to prevent misapplication, to foster proper use of the statute and to enable the Courts to execute the intent of the Congress to maintain objectivity in honest and fair Government.

3. The decision below affects the relationships between all government employees and the commercial sector such that efficiency and initiatives to enhance economic benefits to the Government will be suppressed out of fear to take any innovative action lest the individual be charged and convicted of the slightest technical violation of the statutory provisions of 18 U.S.C. 201(g) and 18 U.S.C. 208(a) as interpreted by a prosecutor and at his discretion.

The instant case demonstrates clearly the absolute de minimis transactions for which charges can now be brought in Federal Court and the far reaches to which the Government will extend in adversarial practice in order to secure a conviction under the statutory provisions of 18 U.S.C. 201(g) and 18 U.S.C 208(a).

The statutes are unfamiliar in public use and are virtually untried. In the instant case, they have been applied to obtain convictions based on a scintilla of circumstantial evidence when opposed by overwhelming evidence of innocence. A conviction for accepting a gratuity has been applied to a Naval officer who followed orders explicitly and conformed to every requirement placed upon him to meet contractual obligations and who received no beneficial gain out of the transaction. A conviction for conflict of

interest has been applied to an officer who bestowed benefit upon the Government in a transaction for which he received no profit and had no financial interest.

Petitioner would urge the Court to note that operational military commanders and Government officers are called upon in the field of combat and the decision arena of Government to make the best use of scarce resources, to employ their best skills in meeting the demands placed upon them by the Nation, and to produce with maximum efficiency and effectiveness in an environment that demands innovation. The decisions rendered in the instant case as to interpretation of the law will have far-reaching consequences as those officers who must react with immediacy may not for fear of possible technical violation of a statute although logic would suggest that their actions are proper.

Certiorari should be granted to establish precedent for operations of Government decision officers to ensure that unwarranted barriers to exercise of judicious, prudent and logical courses of action are not erected by fear of prosecution at the discretion of a Government attorney through use of a statute that could essentially be applied *per se* to virtually any Government transaction.

4. Contrary to the Constitutional provision asserted in the Fifth Amendment providing for due process of law, the Fourth Circuit affirmed convictions for acceptance of a gratuity and for conflict of interest based on erroneous assertions that the Defendant had conceded the elements of guilt, profited on transactions with the Government and had undercharged a motion picture company for flight hours flown violating Navy directives when the trial record is absolutely void of substantiation and presents undisputed and overwhelming evidence to the contrary.

Petitioner respectfully submits that any precedent of law established as to the difficult and controversial application of

the statutory provisions of such potentially far reaching and dangerous concepts as the gratuity and conflict of interest issues under 18 U.S.C. 201 and 18 U.S.C 208 should not be based upon a case that is frought with error, misinterpretation and due process violation. The Petition for Rehearing has been appended and annotated with insertion of applicable excerpts from the record of trial to demonstrate in detail the substantial error involved. Brief analysis of one issue is presented here to provide a basis for granting certiorari.

The Opinion of the Fourth Circuit (A. 1a-18a) asserted that:

> Ultimately, Brown submitted flight hour records indicating that his squadron had flown 32.5 hours. According to the testimony of Agent O'Brien, however, Brown admitted that he <u>should</u> have charged Douglas for 150 hours of flight time, so that his understatment of hours slighted the Navy and benefitted the producer in an

> amount on the order of $435,000. Furthermore, the evidence showed that in July 1979, when the producer and the Navy were engaged in a dispute concerning payment of certain administrative expenses, Brown telegraphed Douglas urging him to pay promptly, since failure to do so might lead to a Naval inquest that might in turn disclose that flight hours had been underbilled.
>
> On this evidence, Brown was convicted under the bribery count, of the lesser included offense of illegally accepting a gratuity in violation of 18 U.S.C. 201(g). (A. 6A).

As presented in the Petition for Rehearing (A. 26a-84a), Petitioner never conceded that he "should have charged Douglas for 150 hours of flight time." On the contrary, direct orders from the Commander, Naval Air Forces, as asserted in his testimony, precluded the Petitioner from charging in excess of the amount of flight time agreed upon between the Navy and the producer, that being 30 hours. The testimony asserted that the separation of charges for training and direct movie

support were in consonance with his guidance.

The statement of Agent O'Brien was that "...he indicated that he -- he could have charged Mr. Douglas for at least a hundred and fifty hours", which was in fact a true statement, only cut short of explaining that official direction was to the contrary and that such charges were improper. The Petitioner further advised the agent that he was not authorized to charge additional hours, that such a charge would have been inappropriate as most of the flight time was training and cross country transit time routinely required for pilot proficiency, and that he had charged the movie company for those hours specifically dedicated to the movie and the remainder properly to training, in accordance with his Navy direction and the contractual obligations between the Navy

and the production company. His statements were conclusively supported in the trial testimony as presented in the Petition for Rehearing (A. 21a-84a) and by the "Navy inquest" (A. 99a-113a) referred to in speculation by the Fourth Circuit. As to the telegram, the Fourth Circuit adjusted the date by two months to fit it into the timeframe necessary to support the circumstantial evidence speculated as to the reasons for its transmission. The telegram was not sent in consonance with delivery of the check, but in response to a cost account-ing for administrative expenses. The Captain of the NIMITZ subsequently testified before the Navy inquest that he had discussed the telegram with the Petitioner and corroborated his testimony in opposition to the testimony of the FBI agent. Of particular note, the Navy inquest asserted (A. 106a-107a) that:

> The NIS and FBI investigations were the basis for the Government's case against Commander Brown. The board found these two exhibits, in the absence of other evidence, were very damning of (him). However, when considered with all relevant facts in the case, the board found these investigations filled with unsubstantiated allegations, many of which were based on rumor and innuendo rather than on good objective evidence.

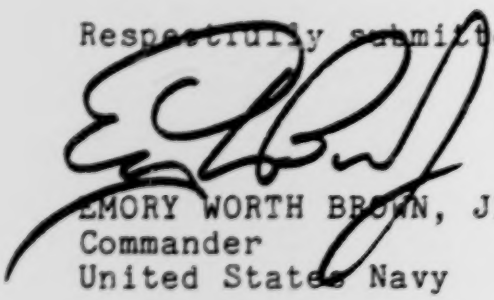
Of note, the movie producer was never charged with giving a gratuity which is of some concern if he did indeed benefit illegally to the extent of "$435,000" as asserted by the Fourth Circuit.

Petitioner respectfully submits that the precedent established by this case is based on a decision absent justification and that the Court should grant certiorari to ensure that Constitutional due process rights are upheld, that the law upon which future decisions to prosecute and upon which convictions removing the civil rights of individuals will be based should not be tainted.

CONCLUSION

In view of the inconsistencies between the opinions of the Circuits as well as the serious questions and far reaching consequences presented, Petitioner urges that this Court should grant a writ of certiorari.

Respectfully submitted,



EMORY WORTH BROWN, JR.
Commander
United States Navy

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Petitioner, Pro Se

No. 84-

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CLERK

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

EMORY WORTH BROWN, JR., Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Emory Worth Brown, Jr.
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Petitioner, Pro Se

VOLUME II
APPENDIX

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VOLUME II

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Unpublished

No. 83-5135

United States of America, Appellee,
v.
Emory Worth Brown, Jr., Appellant.

No. 83-5136

United States of America, Appellee,
v.
Emory Worth Brown, Jr., Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. J. Calvitt Clarke, Jr., District Judge.

Argued March 8, 1984.
Decided August 2, 1984

Before WIDENER, PHILLIPS, and MURNAGHAN, Circuit Judges.

Stanley E. Sacks (Andrew M. Sacks, Sacks, Sacks & Larkin on brief) for Appellant; Raymond A. Jackson, Assistant United States Attorney (Elsie L. Munsell, United States Attorney on brief) for Appellee.

PER CURIAM:

Emory Worth Brown appeals his conviction in a trial by jury of one count of receiving a gratuity in violation of 18 U.S.C. 201(g), and three counts of conflict of interest in violation of 18 U.S.C. 208(a). We affirm.

I.

A.

At the time of the alleged crimes, Brown was commanding officer of VF-84, a squadron of F-14's stationed aboard the U.S.S. Nimitz. In 1979, the Navy entered into a contract with a civilian motion picture production company in connection

with the production of the film "The Final Countdown," to be produced by one Peter Douglas. This contract provided that Brown's flight squadron was to fly in certain scenes in the movie, and that the Navy was to receive $4,000 per flight hour for use of its personnel and equipment. Brown was responsible for coordinating the filming of Naval aircraft. He was also required to document all hours flown so that the movie producer might be properly billed.

According to the testimony at trial, the contract dictated that no Naval personnel would be paid for any work done on the movie while performing their official functions, but that the producer would make certain payments to the health and welfare fund of the Nimitz and the flight squadron from the $250,000 escrow

account established to pay Navy connected costs. because the production of the movie required some remodeling of certain areas of the carrier, the contract provided that all unused property purchased through the Naval procurement system was to remain on the carrier after the movie's completion. Finally, the contract did not allow the producer to contract with any Naval personnel for the performance of movie related services. Thus, according to the testimony of the Navy's project officer for the movie, there would be no reason for Commander Brown to receive a check from the movie producer unless it was destined for the ship's recreation fund, in which case Brown should then have forwarded it to the Secretary of the navy.

Nevertheless, the testimony at trial

indicated that Brown did receive such a check and did not forward it. In July-August of 1979, Brown submitted to Douglas, as producer, an invoice from Binnacle Enterprises, his own table-making business, allegedly for "set materials". Douglas immediately told the assistant producer to have a check drawn and hand-delivered the same day to the address of Binnacle Enterprises, which was in fact Brown'as residence. Trial testimony indicated that this method of payment was highly irregular. Brown, upon receiving the check for $5,563.48, promptly deposited it into his and his wife's joint checking account. According to the testimony of FBI Agent O'Brien, Brown conceded that the set materials in the invoice were not in fact purchased from Binnacle Enterprises and that the

invoice was bogus.

The evidence at trial also suggested a reason for Douglas's irregular payment of the check to Brown. The movie producer originally had estimated that production of "The Final Countdown" would require approximately 30 hours of flight time. Brown concededly was aware of this estimate. Ultimately, Brown submitted flight hour records indicating that his squadron had flown 32.5 hours. According to the testimony of Agent O"Brien, however, Brown admitted that he should have charged Douglas for 150 hours of flight time, so that his understatement of hours slighted the Navy and benefitted the producer in an amount on the order of $435,000. Furthermore, the evidence showed that in July 1979, when the producer and the Navy were engaged in a

dispute concerning payment of certain administrative expenses, Brown telegraphed Douglas urging him to pay promptly, since failure to do so might lead to a naval inquest that might in turn disclose that flight hours had been underbilled.

On this evidence, Brown was convicted under the bribery count, of the lesser included offense of illegally accepting a gratuity in violation of 18 U.S.C. 201(g).

B.

In the spring of 1978, Brown and Francis M. Sweeney, a former naval officer stationed at Oceana naval Air Station in Virginia Beach, established the informal business under the name Binnacle Enterprises. Their primary activity was the production and sale of

tables made from hatch covers. Sweeney purchased the hatch covers and Brown contributed other materials and labor. Brown and Sweeney either sold the tables themselves or placed them for sale at the Aquarius Gift Shop on a commission basis, the shop's proprietor receiving one third of the proceeds. Testimony indicated that the unit fair market value of the tables in their marketing area was approximately $199.00.

Under navy procedures, Brown could then submit appropriate documents containing a description of the item to be purchased, the cost, and the location at which the item was available, and could quickly receive cash with which to purchase any item costing less than $150.00. The evidence at trial showed that on June 19, 1979, Brown submitted a

requisition to the supply officer for the purchase of a nautical block lamp available at Binnacle Enterprises containing the notation "attention Mrs. Sweeney." Brown then called Mrs. Sweeney and told her to confirm, when the supply officer called, that such a lamp was selling for $135.00, which she did. On July 25, 1979, Brown submitted a requisition to the supply officer, this time for the purchase of a table from Binnacle Enterprises for the price of $145.00. The table was in fact purchased. Using the same procedures, Brown caused to be purchased another table at the same price. Although trial testimony indicated that the price of $145.00 was very low for the tables sold, Brown conceded that he had made some profit from the sale of the tables and

that he had not disclosed his financial interest in Binnacle Enterprises to the navy at the time he submitted the purchase requests.

On this evidence, Brown was convicted of three counts of conflict of interest.

II.

To his ultimate conviction on four of the seventeen counts charged in connection with his "Final Countdown" conduct, Brown assigns nine legal errors for our review. In summary, they challenge the sufficiency of the evidence to convict him of the lesser included receipt of gratuity offense, the propriety of the trial court's supplemental instruction on that issue, the sufficiency of the evidence to convict him on three of the conflict of interest counts, the admissibility of the

testimony of two government witnesses, the trial court's refusal to declare a mistrial for juror misconduct, and the trial court's admission of statements made by the defendant in plea negotiations leading to a guilty plea later withdrawn.

Of these assigned errors, only one, the first, requires extended discussion.

A.

Illegal receipt of a gratuity, a lesser-included offense of bribery of a public official, is defined as follows:

> (g) Whoever, being a public official, ... otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of

value for himself for or because of any official act performed or ... Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

18 U.S.C. 201(g) (emphasis added). Undisputed evidence established that Brown received, at Peter Douglas's direction, a check in the amount of $5,563.48, and that at the time he received this check he was a public official. It was also established beyond dispute that brown's receipt of the check was"otherwise than as provided by law for the proper discharge of official duty." Brown's argument therefore focuses on the alleged insufficiency of the evidence to show that this payment was received "for or because of any official act" he performed or would perform in the

future. The argument has two prongs.

The first is that there is no evidence identifying the "official act" for or because of which the payment could have been made. Second, since the evidence upon which he was convicted was presented in support of a bribery charge on which he was acquitted, the jury must necessarily have rejected the government's theory that the bribe was received for falsely reporting the flight hours. This necessarily left no basis upon which the jury could rationally have found that Brown received a gratuity, though not a bribe, for or because of the only "official act" possibly supported by evidence.

We disagree. As to the latter point, a conviction is not invalidated by its apparent conflict with what could be

thought the jury's "necessary holding" in rendering another, related verdict. Hamling v. United States, 418 U.S. 87, 101 (1974); United States v. Dotterweich, 320 U.S. 277, 279 (1943). As to the first point, there was substantial evidence to support the inference that Brown did in fact receive the check "for or because of" either understating the number of hours for which the producer would be charged or gratuitously remaining silent when disclosure of this fact was required by Naval regulations, either of these being "official acts" within the meaning of the statute.

B.

We have carefully considered the other eight assignments of error and find no merit in any of them.

The objection to the supplemental

instruction on receipt of a gratuity issue essentially focuses upon the court's use of the phrase "as a result of the performance of an official act" rather than, as requested by the defendant, "because of and in exchange for duties that he was required to perform." Viewed in total context of the original instruction and the form of the jury's request, and taking into account the discretion reposed in the trial court, this supplemental instruction cannot be found prejudicial. The words "result of" as included in the challenged instruction are essentially synonymous with and supplemental to the statutory language as used in the original instruction, "for or because of." In contrast, defendant's requested language "in exchange for" imports a quid pro quo

element that is not required to establish guilt of this offense. See United States v. Neiderberger, 580 F.2d 63, 68-69 (3rd Cir.), cert. denied, 439 U.S. 980 (1978).

The argument that there was insufficient evidence to convict on the three conflict of interest counts borders on the frivolous. It rests essentially on the suggestion that the statute simply was not designed to proscribe conduct so insubstantial in terms of volume and profit as was here proven. While it may well be a matter for wonder why one in this defendant's position would engage in so banal a pursuit as that he sought to depict here, there is nothing in the statute to suggest a de minimis limit on the conduct it proscribes. The "substantiality" required by the statute relates only to the charged person's

"participation" in the proscribed conduct, not to its volume or to the profit realized from it. here the evidence was overwhelming to support a jury finding on each of the counts in question that "Brown participated personally and substantially" in the purchase of property for the United States from an entity in which he knew he had a financial interest, in violation of 18 U.S.C. 208(a).

The challenges to the admission of testimony by two qualified government witnesses to, respectively, the Navy standards of conduct governing the acceptance of gifts by navy personnel and the terms of the movie contract are without merit. Admission of the testimony in each case was well within the discretion of the trial judge.

We have also considered the defendant's assignment of error respecting the trial court's asserted refusal to allow the defendant to make a "missing witness" argument to the jury, the refusal to declare a mistrial for juror misconduct, and the admission of plea negotiations, and we find no basis for reversal in any of these.

The judgment is therefore

AFFIRMED

APPENDIX C

FILED
SEP 21, 1984

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-5135

United States of America,

Appellee,

versus

Emory Worth Brown, Jr.,

Appellant.

No. 83-5136

United States of America,

Appellee,

versus

Emory Worth Brown, Jr.,

Appellant.

Appeals from the United States District Court for the Eastern District of Virginia, at Norfolk. J. Calvitt Clarke, Jr., District Judge

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The appellant's petition for

rehearing and suggestion for rehearing en banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Phillips, with the concurrence of Judge Widener and Judge Murnaghan.

For the Court,

JOHN M GREACEN
CLERK

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 83-5135 & 83-5136

EMORY WORTH BROWN, JR.,

Appellant,

v.

UNITED STATES OF AMERICA,

APPELLEE

PETITION FOR REHEARING EN BANC ON BEHALF OF APPELLANT, EMORY WORTH BROWN, JR.

TO: The Honorable Judges of the United States Court of Appeals for the Fourth Circuit

INTRODUCTION

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, and the applicable

Rules of this Circuit, Appellant, Emory Worth Brown, Jr., hereinafter sometimes referred to as "defendant", respectfully petitions this Court for a rehearing and/or a rehearing en banc of the decision of a Panel of this Court issued on August 2, 1984, under the short style of United States v. Brown, hereinafter referred to as "the Opinion." Page numbers set out herein refer to pages in the appendix unless otherwise described as page numbers in the trialtranscript.
The Opinion affirms the convictions of the defendant of one (1) count of receivng a gratuity in violation of Title 18 U.S.C. 201(g) and three (3) counts of conflict of interest in violation of Title 18 U.S.C. 208(a).

Counsel for the defendant respectfully represents that a rehearing is both necessary and compelled due to the existence, in counsel's judgment, of each of the following substantial situations, each one of which alone presents a

clear ground for rehearing:

1. The Opinion overlooks material facts in the record in concluding that the defendant admitted that he understated the number of hours of flight time charged to the movie, which formed the basis for the defendant's conviction, of receiving a gratuity, because the record clearly establishes that the hours flown in excess of the 32.5 hours charged to the movie were properly charged to training and/or cross country flying in accordance with Navy directives.

2. The Opinion overlooks material facts in the record by holding that the telegram sent by the defendant to Douglas urged Douglas to pay certain administrative expenses promptly in order to avoid a Naval inquest which might disclose that flight

hours had been underbilled, which holding formed the basis for the defendant's conviction of receiving a gratuity.

3. The Opinion overlooks material facts in the record by holding that the check received by Brown was "for or because of" either understating the number of hours of flight time charged to the movie or gratuitiously remaining silent when disclosure of the fact that the number of hours was underreported was required by Navy regulations, where the clear evidence was the such check was to reimburse Brown for monies spent directly out of his own pocket for renovation and remodeling of his squadron's ready spaces and for expenses incurred by him personally in conjunction with the filming.

4. The Opinion overlooks material facts in the record by holding that the defendant

made a profit from the sale of hatch cover tables and a nautical block lamp, which formed the basis for defendant's conviction on the three (3) counts of conflict of interest, where the evidence was that the defendant made no such profit.

Defendant, by counsel, respectfully submits that each of the above-described situations mandates a rehearing.

REASONS FOR REHEARING

I. THE OPINION OVERLOOKING MATERIAL FACTS IN THE RECORD IN CONCLUDING THAT THE DEFENDANT ADMITTED THAT HE UNDERSTATED THE NUMBER OF HOURS OF FLIGHT TIME CHARGED TO THE MOVIE, WHICH FORMED THE BASIS FOR THE DEFENDANT'S CONVICTION OF RECEIVING A GRATUITY, BECAUSE THE RECORD CLEARLY ESTABLISHES THAT THE HOURS FLOWN IN EXCESS OF THE 32.2 HOURS CHARGED TO THE MOVIE WERE PROPERLY CHARGED TO TRAINING AND/OR CROSS COUNTRY FLYING IN ACCORDANCE WITH NAVY DIRECTIVES.

The Opinion asserts that according to the testimony of Agent O'Brien, the defendant admitted that he "should" have charged Douglas for 150 hours of flight time thereby slighting the Navy and benefitting the producer. That is an incorrect statement of fact.

At no time did the defendant ever concede that he should have charged for more flight hours than he did. A review of Agent O'Brien's testimony indicates that the defendant told O'Brien that he "could" have charged Douglas for 150 hours (app. 196).

DIRECT EXAMINATION: (Record p. 594)

GOV'T: Okay. Now, did you have occasion to question the defendant about accounting for the flying hours during the making of the movie "The Final Countdown".?

O'BRIEN: Yes, I did.

GOV'T: All right. Did he relate to you how many hours he had flown in support of the movie?

O'BRIEN: Well, he indicated that he, on official records, had flown 32.5 — thirty two and a half hours for the production of the movie; however, he indicated that he — he could have charged Mr. Douglas for at least a hundred and fifty hours.

CROSS EXAMINATION: (Record pp. 613-615)

DEFENSE: All right. Now you remember being asked some questions by Mr.

Jackson concerning the hours charged, the flying hours?

O'BRIEN: Uh-huh.

DEFENSE: And you said that he could have charged for a hundred and fifty hours. That's what he told you?

O'BRIEN: Yes, sir.

DEFENSE: All right, sir. But he told you more than that about those hours, didn't he, that you haven't told us yet?

O'BRIEN: If you ask me questions, I'll try to tell you.

DEFENSE: All right. I direct your attention to page 4, about midway down --

O'BRIEN: Excuse me. Is this the second statement?

DEFENSE: Yes. Page 4.

O'BRIEN: Uh-huh.

DEFENSE: Didn't Commander -- about midway down, the third paragraph on that page. Didn't he tell you that "he carefully reviewed each flight hour and decided to charge the production company only the time actually spent for filming and charge the other flight hours against the allocated training hours for the squadron"?

O'BRIEN: Yes, he told me that.

DEFENSE: All right. All right, sir. And then didn't he also tell you that when he refigured the flight hours spent in support of the movie, he took out such things as the time spent on deck for refueling, the time taken in transit from the base to the area where the filming was done, and the down time while the planes were flying but no actual photographing was taking place."?

O'BRIEN: Yes.

DEFENSE: And then he also told you that "All the crew members in the squadron who were involved in the filming of the movie were consulted regarding the hours charged to the movie company and knew that Brown was only charging the movie company for hours spent in filming."

O'BRIEN: Yes, Sir.

DEFENSE: Now, also, finally, Mr. O'Brien, Commander Brown denied any bribe, didn't he.

O'BRIEN: Yes, he did.

While it is true that approximately 150 hours of flight time were incurred by the

defendant and his squadron, 117.5 of those hours were properly charged to training pursuant to naval directives. From the very beginning it was understood and agreed that only 30 flight hours were budgeted for and would be charged to the motion picture company. Robert D. Shupe, retired Navy Commander who was the Navy Cost Collector for the movie and who was called as a prosecution witness, confirmed that 30 hours was an established number of flight hours that the squadron was expected to fly for the motion picture (Tr. 511-517).

DIRECT EXAMINATION: (Record pp. 511-512)

GOV'T: Prior to the initiation of flying support for the movie was there an established number of hours that VF-84 was expected to fly?

SHUPE: Yes.

GOV'T: And how many hours was that?

SHUPE: Thirty.

GOV'T: Now, what type of aircraft -- what type of aircraft was

expected to fly thirty hours?

SHUPE: F-14.

DIRECT EXAMINATION: (Record p. 513)

GOV'T: Okay. Now once the thirty hours had been established as the projected amount of hours the F-14's would fly, that is, the defendant's squadron —

COURT: You mean each F-14 plane in the squadron 84 was to fly thirty hours a month?

SHUPE: No. No, No. Total flight time of all the planes in VF-84 were to fly thirty hours. Thirty hours was the amount targeted to be expended to film the movie.

GOV'T: In any event, was it correct that thirty hours was the total projected —

SHUPE: Yes, total hours —

GOV'T: — to be flown by the squadron?

SHUPE: Thirty hours was the figure that was provided by the technical adviser, Captain Graves.

DIRECT EXAMINATION: (Record pp. 515-516)

GOV'T: I'd like to show you what has been previously marked as

Government exhibit 18 for identification. And what is the exhibit, please?

SHUPE: This is a message from Fighter Squadron 84 to Commander, Naval Air Force, Atlantic Fleet.

GOV'T: Is that the message you received from the defendant?

SHUPE: Yes, it is.

GOV'T: And what did the defendant tell you he was going to do about flying hours in the message?

SHUPE: He said he was going to fly approximately thirty-five hours for the movie and sixty-five hours for aircrew training.

GOV'T: Now, was this thirty-five hours for the movie in addition to the thirty already projected?

SHUPE: No. This was the original thirty.

GOV'T: Now, for the month of June 1979, after you had received that message, did you eventually get a report of how many hours had been flown in June?

SHUPE: Yes, I did.

GOV'T: Okay. I show you what has been previously marked as Government exhibit 35 for identification,

and ask you whether you recognize that?

SHUPE: Yes. This is the budget OPTAR report for the month of June, reporting thirty-two and one-half hours.

GOV'T: Okay. And was that thirty-two and a half hours flying time for the movie?

SHUPE: Yes, that's right.

Commander Shupe, therefore, confirmed that the defendant had, sent him a naval message through official channels separating the flight hours to be charged to the motion picture from those to be charged to training as he had been directed to do. Shupe asserted that 30 hours was the contracted figure based on a dollar constraint (TR. 533).

CROSS EXAMINATION: (Record p. 533)

DEFENSE: All right, sir. And at the beginning, it was projected, I think you testified, that thirty hours would be required to be flown in support of the movie?

SHUPE: That's correct.

DEFENSE: And do you know where you learned that fact?

SHUPE: Yes. In that particular document there was a reference there about the technical adviser, Captain Graves, who would provide information as to the exact requirements, and he provided us with a memorandum with the best know requirements at that time.

DEFENSE: All right, sir. Now of course, this was a new experience for you, was it not?

SHUPE: That's correct.

DEFENSE: This cooperation between the movie people and the Navy?

SHUPE: Exactly.

DEFENSE: And you really had no guidelines as to how to do it, that is, from anything that had ever been done before?

SHUPE: Right.

DEFENSE: You all were sort of playing it as you went along?

SHUPE: Correct.

DEFENSE: ...Am I correct in assuming that the thirty hours projection was also something that nobody

really knew, but that's what was projected?

SHUPE: Well, it was something that was projected based on a dollar constraint.

DEFENSE: Meaning that for the amount of money that somebody wanted to spend, that's what they wanted to hold it to?

SHUPE: Exactly.

Commander Shupe testified that the defendant had properly reported that the flying for the month of June in support of the motion picture company was 32.5 hours (Tr. 537).

CROSS EXAMINATION: (Record p. 537)

DEFENSE: And would you know for us for our purposes, approximately when the actual costs started; that is, when did the movie start, from your standpoint, of costs being incurred?

SHUPE: All right, We established our criteria on the 31st of May and VF-84 reported in their June BOR for May expenditures a small amount of admin expenditures. In June, the BOR for June that was dated the 4th or 5th of July,

they reported the $16,000.00, the first increment of Admin charges and the first flying hour charges of thirty-two and a half.

DEFENSE: All right. But what do you mean by "BOR"?

SHUPE: That's the budget OPTAR report.

DEFENSE: All right.

SHUPE: That's the accounting report or the accounting document that each squadron provides for the accountants.

Commander Shupe also asserted that he "knew that all along" that flying was going to be apportioned between training and the movie and he corroborated the 32.5 flight hours flown and confirmed that there was no other movie flight activity other than the June flying (tr. 543-545).

CROSS EXAMINATION: (Record p. 543)

DEFENSE: ... you knew from June — your office, at that level, knew from June 21, 1979, that — that the flying to be done thereafter was going to be apportioned between

training and movie exclusive use, didn't you?

SHUPE: Well, I knew all along. That's the whole — All the flying that the squadron does right now is training. When they're back on the beach, that's all the kind of flying they do — is training.

CROSS EXAMINATION: (Record p. 544)

DEFENSE: In other words, from June 21st of 1979, if you had any reason to want to further examine what's being allotted to training and what's being allotted to ... movie flying, you had an opportunity to do it, didn't you?

SHUPE: Well, there was no reason because for the June BOR, only thirty-two and a half hours were reported as flown ... and that was all that was reported. So I didn't have any reason to go back and question that. We had programmed thirty hours. So we had flown thirty-two and a half hours.

CROSS EXAMINATION: (Record p. 545)

SHUPE: ... we sent a message in August asking if any flying activity took place in July. The July BOR reported no flying activity, and I sent a message to both the attack squadron — and I knew

there was no helo flying — and I sent a message to VF-84 and VA-35 and asked them to reconfirm the BOR data that reported no flying activity in July.

DEFENSE: Well, in other words, whatever squadrons you asked in July, whether there was any flying, they all reported no activity?

SHUPE: That's correct.

Commander Shupe confirmed that Brown had conformed explicitly with his request to itemize all movie company expenditures (TR. 545-547).

DIRECT EXAMINATION: (Record p. 545-547)

DEFENSE: ... and you sent a message to him in Rota, Spain?

SHUPE: Correct.

DEFENSE: ... and you requested that he send you a detailed itemization of the costs?

SHUPE: Correct.

DEFENSE: So that you could, in turn, explain them to whoever wanted an itemization from your office, correct?

SHUPE: Well, it wasn't so much my

office. It was our superior, Commander in Chief, Atlantic Fleet.

DEFENSE: All right, sir. What you wanted to do was to be able to itemize it for them, —

SHUPE: Correct.

DEFENSE: — and so you asked Commander Brown to itemize it for you?

SHUPE: Correct.

DEFENSE: Now, he sent you copies of every 1348 that was ever used in support of the movie, didn't he?

SHUPE: Correct.

John Hyde, who was in charge of motion picture productions for Aspen Productions, testified that it was his understanding with the Navy that as long as the flying was for realistically justifiable training missions, refueling missions, or other flying that the flyers had to do to keep their qualifications, then the movie company would not be charged for those flight hours (Tr. 136-137).

CROSS EXAMINATION: (Record p. 136-137)

DEFENSE: Now, based on that firsthand participation and observation, what was the understanding between the Navy and the film people about charges for flight hours for — well, for flights from Oceana to Key West, for example, when there was no actual filming taking place? What was your understanding?

HYDE: My understanding — and it was my understanding from the beginning, both with, say, long discussions with Peter Douglas, that as long as they were realistic, justifiable training missions, refueling missions, or whatever, that the flyers had to do to keep their qualifications, then we would not be charged. — but when we had specifics — for instance, when we had an F-14 shoot down a Japanese Zero — it wasn't considered as a normal training exercise.

Hyde specifically testified that the defendant never solicited, suggested, asked or requested anyone at Aspen Productions to give him anything so that he would charge less hours, and that no one ever gave the defendant anything of

value to pursuade him to charge less hours (Tr. 143-145).

CROSS EXAMINATION: (Record p. 143-145)

DEFENSE: Now, Mr. Hyde, to your knowledge, did Commander Emory Brown ever solict a bribe from Aspen in order to charge you less for the flight hours?

HYDE: No, sir.

DEFENSE: Do you know of Commander Brown ever, soliciting, suggesting, asking, requesting, anybody at Aspen Productions to give him something so he'd charge you less hours?

HYDE: No, sir.

It is important to note that the flying for the movie was originally scheduled to be performed out of NAS Oceana, but was changed by the Navy to NAS Key West. This required the defendant and his squadron to fly to NAS Key West on a regular basis. These hours were (the 150 hours cited by the defendant as potentially chargeable to the movie and were) legitimately

charged to training time pursuant to Navy directives.

Lieutenant Kevin Miller (Tr. 667-670, 675), Commander John Eastman (Tr. 696-697) and Commander Richard Farrell (Tr. 852-857) confirmed that cross-country flights between Oceana and Key West were legitimate charges to training.

DIRECT EXAMINATION: (Record p. 667-670)

DEFENSE: I think I asked you, Lieutenant: Based on your experience as related by you, described to us today, were those flights that you coordinated back and forth to Key West in relation to the movie -- were they cross country flights, in your Naval judgment, as that term is used in the Navy?

MILLER: Yes, sir. Every time we get in the airplane and we -- in a time of budgetary constraints, any time we try to get a certain number of flight hours per month for each pilot -- every crew member to maintain readiness. Commander Brown specifically tried to get every single crew member involved in the flying for the movie because that was what we were doing at that time frame -- for everybody to maintain

their proficiency — and so, yes, in fact they were training flights.

DIRECT EXAMINATION: (Record p. 696-697)

EASTMAN: I was the maintenance officer in the squadron at the time of "The Final Countdown", and my responsibility was to make sure the airplanes were properly configured. That means with the proper ordnance load, that they were maintained properly, that they all had basically the same numbers on them so that any time the movie company took pictures, it would be the same airplane, essentially; it would be easier for editing; and specifically, of course, would be to supply the airplanes that were used down in Key West during the major part of the tropical scenes in the film.

DEFENSE: Do you know of your own knowledge whether any of VF-84's planes went to Key West?

EASTMAN: Yes, sir, they did.

DEFENSE: And where were they flown from to Key West?

EASTMAN: From Oceana to Key West.

DEFENSE: And are you familiar with cross country flights?

EASTMAN: Yes, sir, I am.

DEFENSE: Were they not cross-country flights?

EASTMAN: They indeed were.

DIRECT EXAMINATION: (Record p. 852-853)

DEFENSE: You are a pilot?

FARRELL: Pilot.

DEFENSE: And did you ever go to Key West?

FARRELL: Yes, sir. I did.

DEFENSE: Fly in some movie scenes?

FARRELL: Yes, sir.

DEFENSE: Did you ever fly your plane down there from Oceana?

FARRELL: Yes, sir, I did.

DEFENSE: In you judgment, based on your participation, were those flights from Oceana to Key West cross-country flights?

FARRELL: To down there -- to and from --

DEFENSE: Yes.

FARRELL: -- were basically, yes, sir, cross-country.

DIRECT EXAMINATION: (Record p. 855-857)

DEFENSE: All right. Commander, what I'd like to know is: Did you yourself -- do you know of anything with certainty as to whether or not that subject matter ever came up in Key West -- and the subject matter is division of hours, flight hours -- between training and between direct movie company use?

FARRELL: Yes, sir. There was going to be a division of movie hours and training hours.

DEFENSE: All right. Now, did you know that or not at that time because you were a Navy pilot, flying down there and participating in the movie? Did you know it and learn it in that capacity?

FARRELL: Yes, sir.

DEFENSE: You said something about a team. You were a member of a team who were flying in the movie?

FARRELL: I was -- I flew almost every flight involved with making the film, I was on the schedule. I was one of the primary pilots that flew, and because of the need to keep continuity, one of us had to be the guy that -- even though we took different people up, somebody had to have been

there before to kind of make things go smoothly, and I was the pilot designated as the lead in the filming.

DEFENSE: All right, sir. What I really want to ask you is: When that subject came up, to your knowledge, about the division that I've talked about, can you tell me — and you can estimate that, I believe -- timewise, was that early on in the filming or did that come up when the filming was almost over with, or what?

FARRELL: It came up right at the beginning of the filming — within the first week.

Commander Farrell confirmed that training and motion picture flying were being simultaneously conducted at Key West (Tr. 871-872), and testified that the defendant properly charged to the motion picture company that flying time which was not in direct support of the film (Tr. 878-880).

DIRECT EXAMINATION ,OUT OF THE PRESENCE OF THE JURY.: (Record p. 871-872)

DEFENSE: Do you have an opinion, based on

your experience as a pilot and your participation in the movie, as to whether or not there was actual flying going on that was consistent with and was actual training? ... In other words, were you all flying training hours as well as being down there for the movie at the same time?

FARRELL: Yes, sir, we were.

DEFENSE: All right. Was there discussion — Did Commander Brown say anything to you or in your presence about charging — properly charging flying hours to training where it properly could be done so?

FARRELL: Yes, sir. He told me that was his plan.

DEFENSE: All right. And to charge the movie company where it was directly and exclusively for the movie?

FARRELL: Yes, sir. That was the solution to the problem of the cost being so high.

COURT: What was the solution to the problem?

FARRELL: Solution was to charge not every flight from takeoff to landing to film effort if — just to charge the portion of the flight that was related to the film —

filming, use — take that portion and charge that to the company. The rest of the flight, takeoff, landing, refueling operations, things that we did as basic training functions and proficiency — would improve pilot proficiency, wouldn't be charged towards the company.

DIRECT EXAMINATION: (Record p. 878-880)

DEFENSE: Did you have any discussion with Commander Brown concerning the projected cost of flight hours and the movie cost -- the cost to the movie people of flight hours?

FARRELL: Yes, sir, I did.

DEFENSE: What did you tell Emory Brown and what did he do?

FARRELL: He told me that because of the increased cost per hour that we would have to look at each flight and break down the flight portions, to allocate some of the flight to training purposes and other portions of that particular flight would be apportioned for filmmaking and would be allocated to film production.

DEFENSE: Did he ever say anything one way or the other about allocating it in a way that wasn't accurate or true?

FARRELL: No, sir.

DEFENSE: To your knowledge, was there ever any suggestion made at any time during the filming and after the filming to inaccurately charge something to training that should have been charged to the movie company?

FARRELL: No, sir.

Admiral George Kinnear, who was the Commander, Naval Air Forces, Atlantic Fleet during the period of the motion picture production and was in fact Brown's ultimate superior, testified that he had formulated a policy, that less than 40 hours of flight time including the F-14s from Commander Brown's squadron and the helicopters were to be flown for the motion picture (Tr. 1217).

CROSS EXAMINATION: (Record p. 1217)

DEFENSE: And did you not formulate a policy as to flight hours or -- well, did you formulate the policy?

KINNEAR: I formulated the policy and -- you'll have to realize I'm drawing on memory. I've reviewed

no notes and consulted with none of my staff in this -- former staff in this respect, but the estimate that there was to be less than forty hours of flying time -- and I believe that included the F-14's and the helicopters -- that's the only thing I remember being included in that -- the upper estimate of what those flying hours would cost was $250,000.

Admiral Kinnear asserted that he "gave some definitive guidance in that respect that any flying that was in the training plan..."it is not necessary that that be charged against the movie (TR. 1218-1219). Admiral Kinnear further asserted that anything that was properly training was to be charged not to the movie company but to training (Tr. 1219).

CROSS EXAMINATION: (Record p. 1218-1219)

DEFENSE: All right, sir. Now, in addition to the dealing with the estimated cost and number of hours, didn't you also formulate some general policy as to which hours would be charged to the movie company and which hours would not be charged

to the movie company?

KINNEAR: I gave some definitive guidance in that respect that any flying that was already in the training plan -- inasmuch as the end product is combat readiness, the commanding officer is always responsible toward trying to keep his squadron in a state of training that is commensurate with where we expect them to be at the staff level, and included in that, of course, are certain allocations of flying hours to be used for different things. Any flying hours that were going to be done in the way of, let's say, familiarization, post-maintenance check hops or test hops, those kinds of things, anything that would have been flown anyhow, it was not necessary that that be charged against the movie. However, any flying that was done beyond that that was already programmed in the training plan or included in some way in the prescribed activities of the squadron would have to be charged to the movie.

DEFENSE: All right, sir. Now, anything, of course that was directly required by the movie company exclusively and wouldn't have been otherwise was to be charged to the movie company; is that correct?

KINNEAR: That certainly would qualify for what I've said, yes.

DEFENSE: All right, sir. Then anything that was properly training was not to be charged to the movie company but to training, was it not?

KINNEAR: That's correct.

DEFENSE: And that was your policy established by you?

KINNEAR: That's also correct.

Admiral Kinnear further testified that cross-country flights are within the judgment authorization of squadron commanding officers to use in his training plan, are permissible as training and that this is usually spelled out in the syllabus. He also asserted that it would be consistent with the guidance he gave to say that there would be nothing improper in the relationship of the Navy with the movie people to charged to the movie company only that which was required that otherwise would not have been required (Tr. 1220-1222).

CROSS EXAMINATION: (Record p. 1220-1222)

DEFENSE: All right, sir. Now, — but the commanding officer had the highest responsibility in the squadron for devising and carrying out the training plan for his squadron?

KINNEAR: That's correct.

DEFENSE: And the commanding officer had, I would assume, did he not — didn't he have discretion, as commanding officer, as to how to carry out that plan, as long as it produced the required hours and whatever is required to effect training?

KINNEAR: Probably the most important guidance that he has is the amount of money he gets against which he can do his flying, and it's his responsibility to do his training within the dollar allowance of flying hour allocation; and if he's unable to do so, then he must communicate up the staff to the AIRLANT level to explain why he needs more money or, on the other hand, why he hasn't been able to spend his money.

DEFENSE: All right, sir. But the commanding officer — isn't he responsible to see that his pilots get a certain amount of flying time.

KINNEAR: That is one of his primary responsibilities.

DEFENSE: All right, sir. But he has that judgment auithority — the commanding officer?

KINNEAR: Yes.

DEFENSE: All right, sir. Now aren't cross- country flights within the judgment authorization of a commanding officer or a fighter squadron to use in his training plan, if he sees it as a proper way to effect the requisite training?

KINNEAR: A reasonable amount of cross-country flying would be appropraite, particularly if it were to different airfields for the purpose of indoctrination.

DEFENSE: All right, sir. And finally, there would be nothing improper in the relationship of the Navy with the movie people to charge to training that which properly could go to training and charge to the movie company only that which was required that otherwise wouldn't have been required; isn't that true?

KINNEAR: That would be consistent with the guidance I gave, yes.

The evidence therefore conclusively

supports Commander Brown's contention that he conformed explicitly to the direction given him by his superior officers to remain within budget constraints of 30 hours charged to the motion picture company; that when he was required to extend by 2.5 hours beyond that figure, he officially requested and received permission to do so and that he charged only that flying to the motion picture company which was legitimately charged to training in consonance with the guidance from the Commander, Naval Air Forces, Atlantic Fleet.

II. THE OPINION OVERLOOKS MATERIAL FACTS IN THE RECORD BY HOLDING THAT THE TELEGRAM SENT BY THE DEFENDANT TO DOUGLAS URGED DOUGLAS TO PAY CERTAIN ADMINISTRATIVE EXPENSES PROMPTLY IN ORDER TO AVOID A NAVAL INQUEST WHICH MIGHT DISCLOSE THAT FLIGHT HOURS HAD BEEN UNDERBILLED, WHICH

HOLDING FORMED THE BASIS FOR THE DEFENDANT'S CONVICTION OF RECEIVING A GRATUITY.

The Opinion states that "the evidence showed that in July 1979, when the producer and the Navy were engaged in a dispute concerning payment of certain administrative expenses, Brown telegraphed Douglas urging him to pay promptly since failure to do so might lead to a Naval inquest that might in turn disclose that flight hours had been underbilled.

Such a statement is misleading and incorrect. In fact, the actual telegram was not produced at trial by the Government, and the only evidence with regard to the contents other than that given by the defendant was merely speculation as to its contents by Commander Shupe and Agent O'Brien who had no first hand knowledge.

Defendant advised Agent O'Brien that he had

sent a telegram to Douglas from the Nimitz while enroute to the Mediterranean in response to a query from AIRLANT. The telegram was sent in mid-September, not July, six weeks subsequent to defendant's receipt of the check in reimbursement for his expenses. The defendant advised O'Brien that there was no relation between the check and the telegram; and that he had received approval of his Airwing Commander and the Captain of the U.S.S. Nimitz to send the telegram to urge Douglas to conform to his contractual obligations. He also advised O'Brien that adverse publicity and inaccurate interpretation of Navy cross-country flying had recently been the focus of media attention and that the same thing could happen in this instance. He advised him that he had been constrained to charge to the motion picture company no more than 32.5 hours and that he had explicitly accounted for all flying that was directly motion picture related

and charged that to the production company in accordance with navy guidance; he had charged all flying that would be routine training type flying, particularly the cross-country transit flights from NAS Oceana to Key West, to training in accordance with Navy guidance; and that during the period of the motion picture his squadron had flown approximately 200 total hours including training. He advised O'Brien that while more time could have been charged to the picture, it would not have been proper to do so as it was legitimate training flying and would have been in violation of the Navy's contractual obligations and the directives given him. In addition, he advised the Agent that any excess charges beyond the 32.5 hours would have adversely impacted the motion picture company and denied the Navy of the value of the motion picture as a recruiting, retention and public affairs film.

Defendant advised Shupe by telephone from Rota, Spain, that he expected Douglas to conform

to his contractual obligations and that Douglas knew his responsibilities with regard to the film. Brown told Shupe the same facts with respect to the flight hours. Further, the telegram sent by Brown from onboard ship was sent through the Naval Communication System and was open to review by the Executive Officer and the Commanding Officer of the ship, as well as all routine handlers of Naval message traffic. In fact, Brown testified that he discussed the telegram with the Captain of the Nimitz, Rear Admiral John Batzler, prior to sending it (tr. 1112-1124).

DIRECT EXAMINATION: (Record p. 1121)

DEFENSE: Commander, do you have an approximate date or an estimate of when the telegram was sent — when you had the conversation with Captain Batzler and the telegram was sent to Peter Douglas?

BROWN: Yes, sir. It was around the 18th or 19th of September 1979.

DEFENSE: And as of that time, had you seen any publicity before that time concerning Navy aircraft?

BROWN: On numerous occasions, and one stands out.

DEFENSE: And what can you tell us, Commander, without going into the details of it? What was your -- your feeling as far as the accuracy of the publicity that had been given locally about the use of Navy aircraft?

BROWN: I thought it was inflammatory and absolutely inaccurate and inappropriate.

DEFENSE: Did that appear -- did that have anything to do with the movie, --

BROWN: No, sir, it did not.

DEFENSE: -- what you considered to be inflammatory publicity, inaccurate publicity?

BROWN: No, sir.

DEFENSE: Had it appeared in the local newspapers before the movie was even started?

BROWN: Yes, sir, it had.

DEFENSE: And then what were you concerned about as far as the flight hours and the movie situation when you sent the telegram to Douglas?

BROWN: Precisely the same type of inflammatory news article.

DEFENSE: Well, what do you mean? Why did that concern you? What did you think might happen?

BROWN: There was a question about cross-country flying as being training. It was directed towards a specific squadron in which some flying was done for the purpose of a wedding of one of the squadron members.

DEFENSE: Well, you're talking about the prior publicity?

BROWN: That's correct.

DEFENSE: All right. Now what was your concern -- directed now to the day you sent the telegram and talked to Captain Batzler -- what was your concern about the flight hours that -- in the movie situation?

BROWN: Misinterpretation of the cross-country requirements.

DEFENSE: Well, are you saying that you believe the press, if they heard it, might misinterpret it?

BROWN: Yes, sir. It wasn't a matter of interpretation. It was a matter of the way it possibly could be interpreted. News is inflammatory.

DEFENSE: Did you have any concern that the division of the hours was itself improper?

BROWN: Absolutely not. That's been covered by COMNAVAIRLANT, in response to this one news article.

DEFENSE: Well, I'm asking you: At the time you sent the telegram and discussed it with the captain of the NIMITZ, did you have any concern that the hours had actually been illegal or improper in any way?

BROWN: Absolutely not.

DEFENSE: When you and the captain of the NIMITZ discussed it, without going into the discussion and the details, was it a full discussion and disclosure, or what?

BROWN: There was a full discussion; yes, sir.

,Admiral Batzler was subpoenaed to appear at trial but was unavailable due to assignment to a Navy selection board..

III. THE OPINION OVERLOOKS MATERIAL FACTS IN THE RECORD BY HOLDING THAT THE CHECK RECEIVED BY BROWN WAS "FOR OR BECAUSE OF" EITHER UNDERSTATING THE NUMBER OF HOURS OF FLIGHT TIME CHARGED TO THE MOVIE OR GRATUITOUSLY REMAINING SILENT WHEN DISCLOSURE OF THE FACT THAT THE NUMBER OF HOURS WAS UNDERREPORTED WAS REQUIRED BY NAVY REGULATIONS, WHERE THE CLEAR EVIDENCE WAS THAT SUCH CHECK WAS TO REIMBURSE BROWN FOR MONIES SPENT DIRECTLY OUT OF HIS OWN POCKET FOR RENOVATION AND REMODELING OF HIS SQUADRON'S SPACES AND FOR EXPENSES INCURRED BY HIM PERSONALLY IN CONJUNCTION WITH THE FILMING.

The Opinion states that the contract between the motion picture company and the Navy did not allow the producer to contract with any Navy personnel for the performance of Movie related services. This, in fact, is not a correct statement.

The agreement actually was that "no Navy people would be paid for any work they did on the motion picture while they were performing their official functions" (Tr. 174-175).

DIRECT EXAMINATION: (Record pp. 174-175)

GOV'T: First of all, Mr. Graves, did you participate in the making of any agreements respecting how Navy personnel would be reimbursed for participation -- individual participation in this particular movie?

GRAVES: Yes, I did.

GOV'T: And with whom did you make this agreement?

GRAVES: With the producer, Peter Douglas.

GOV'T: Okay. And will you please tell us what provision, if any, was made for reimbursement of individual Navy members for participation in this movie?

GRAVES: The agreement was like any other picture: That no Navy people would be paid for any work that they did on the motion picture while they were performing their official function.

There was no evidence that the defendant

was paid for work that he had done. His contention was that he was reimbursed for out of pocket expenses that were applied to upgrading squadron spaces and other activities that occurred in supporting the motion picture production at cost. He was not paid for services in that he received no personal gain.

The distinction between reimbursement for out of pocket expenses and reimbursement for services is of extreme importance and was not developed in the testimony by Captain Graves. It is the difference between accepting a gratuity on the one hand and simply having monies returned that were properly expended on the other.

Captain Graves stated that "he tried to stay away from the subject of contribution to Navy units" (Tr. 176, 177).

DIRECT EXAMINATION: (Record pp. 176-177)

GOV'T: As a part of the agreement you made with Peter Douglas, did you make any provision for

contributions to the United States Navy as a result of its participation in the movie?

GRAVES: Would you define "contribution"?

GOV'T: When I say "contributions," did you make any agreement respecting how the movie company would show its appreciation, if any, for the Navy's participation in the movie?

GRAVES: Okay. That was a subject that I tried to stay out of, but it was my responsibility to answer questions from Peter Douglas in this regard, and it is customary -- and it was done in this picture -- that a motion picture company would make a donation to the ship or squadron that assisted them in the production of the picture.

He would not have been in a position, therefore, to know of any arrangement that Peter Douglas had made with Commander Brown to reimburse him for expenses. This, in fact, was <u>not a contribution</u> and at no point was ever proven to be a contribution in the transcript. The check in issue was never intended to be a donation as such to the squadron welfare and

recreation fund and was not required to transit the Navy chain of command. Commander Brown provided the work in his Squadron spaces in accordance with direction of the Chief of Naval Operations to provide full cooperation to the motion picture company. Further direction and guidance were not provided, as asserted by the Navy project cost collector, Commander Robert Shupe (Tr. 530).

CROSS EXAMINATION: (Record p. 530)

DEFENSE: All right. Now, you received notice or word of the situation, that is, a movie was going to be made with Navy cooperation even before the costs started to be incurred, did you not?

SHUPE: That's correct.

DEFENSE: And from whom did you get that?

SHUPE: Got that from the office of the CNO. ... Chief of Naval Operations.

DEFENSE: And weren't you told at that time that the Navy was cooperating with the movie company? Correct?

SHUPE: Absolutely.

DEFENSE: And what were you told, in essence, about expenses? Just generally?

SHUPE: Well, I wasn't told anything. The only thing we had in terms of direction was the message, and the message said it was the full cooperation — the movie company had full cooperation and that we were to collect costs as they arose and report them.

The out of pocket expenses for which Commander Brown received the check were for improving squadron spaces in preparation for filming of the motion picture. The squadron was to benefit from these space improvements as they would be permanent in nature; however, the primary function of the improvements was for filming. Testimony in the transcript from Lieutenant Miller (App. 223-227), Commander Eastman (Tr. 698; App. 229; Tr. 702, 703), Chief Warrant Officer Bulick (App. 262a-262b, 264-266), and Chief Roger Maccallum (Tr. 680-688) support the contention by Commander Brown that he did

indeed upgrade and improve squadron spaces applying his own funds.

DIRECT EXAMINATION: (Record p. 664)

DEFENSE: All right. Now did you observe anything unusual concerning the ready rooms — the squadron ready rooms when Emory Brown was executive officer and commanding officer?

MILLER: Well, the ready room — since you spend so much time in it, it has to be a place, for morale purposes, where people can want to be there and can perform there. ... I observed the fact that when Commander Brown came to the squadron, our ready room was a shambles, and as he became commanding officer, he directed people to bring it up to a place where we would enjoy being there. And so we went from a very low morale state to having the best ready room, and people would want to come and spend time with us on the ship.

DIRECT EXAMINATION: (Record p. 680-683)

M'CALLUM: And I was the — I guess you'd call it the duty carpenter. I can build anything.

DEFENSE: You can do what?

M'CALLUM: I can build anything.

DEFENSE: Well, did your duties put you in actual contact with the executive officer or commanding officer?

M'CALLUM: Yes, I built a lot of things for him.

DEFENSE: Well now, when you say you built things for Commander Brown, were they for the squadron?

M'CALLUM: Yes, sir.

DEFENSE: Would you tell us -- would you elaborate a little? Explain what you mean by building for Commander Brown for the squadron.

M'CALLUM: Okay. When Commander Brown had come to the squadron in -- and we had been in a transition period from one type of aircraft to another and we had been sitting around going from one school to another, and whatever, and our squadron spaces at Oceana, in the Hanger, they were just, you know, drab type places, not a nice type environment to work in. We were getting ready to go on a nine-month cruise with a new aircraft, all new crew, and whatever, and we redid all the maintenance spaces and built bulletin boards, podiums, and picture frames, cabinets; just dressed up the working areas to make it, you know, a better place to work.

DEFENSE: And whose -- whose -- who initiated that? Whose idea was that?

M'CALLUM: Commander Brown.

DEFENSE: When did he initiate that effort, was he then the executive officer or commanding officer?

M'CALLUM: He was the executive officer.

DEFENSE: Had his predecessor, the man before him, or anybody in the squadron before him done anything like that for the spaces for the men?

M'CALLUM: No, sir.

DEFENSE: And over what period of time did you actually work on improving those working spaces for the men?

M'CALLUM: The whole time, in all my spare time. I started to run the weapons shop also. I did it, and mostly in my spare time. ... It was probably a period of six to eight months, I reckon.

DEFENSE: You've been in the Navy eighteen years?

M'CALLUM: Yes, sir.

DEFENSE: Have you ever seen anything compared to that effort to improve the spaces for the men in any other outfit?

M'CALLUM: No, sir.

DEFENSE: Did you do any of that on your own time?

M'CALLUM: Yes, sir.

DEFENSE: Were you compensated when you worked on your own time?

M'CALLUM: Sure was.

DEFENSE: Do you know where the money came from to pay you to fix up the men's spaces?

M'CALLUM: Commander Brown.

DEFENSE: From his own pocket?

M'CALLUM: Yes, sir.

CROSS EXAMINATION: (Record p. 685-686)

GOV'T: Now, you've indicated you did a lot of carpentry work. When you did a lot of this carpentry work, it required a lot of materials; is that correct?

M'CALLUM: Right.

GOV'T: And to get the materials, you had to expend a lot of funds?

M'CALLUM: Right.

GOV'T: And did you personally pick up these materials that you used?

M'CALLUM: Sure did.

GOV'T: And did you personally go out and purchase the materials?

M'CALLUM: Yes.

GOV'T: And in purchasing the materials, did you use your own money?

M'CALLUM: No.

GOV'T: What money did you use?

M'CALLUM: Commander Brown's.

GOV'T: Okay. When you say Commander Brown's, did you see — have you ever heard of the self-help fund?

M'CALLUM: Right.

GOV'T: Did you ever go to the self-help fund to get funds?

M'CALLUM: No, sir.

GOV'T: Have you ever heard of the imprest fund?

M'CALLUM: No, sir.

GOV'T: Now, can we take it that you assumed Commander Brown used the money out of his own pocket? Is that correct?

M'CALLUM: Right. They were his personal checks.

GOV'T: Okay. Personal checks drawn on what? Were they drawn on his personal account?

M'CALLUM: His account. They were his name and his wife's.

GOV'T: Okay. Now did you ever make a request for any type of funds or anything from the Navy in order to obtain material to do carpentry work?

M'CALLUM: No, Sir.

DIRECT EXAMINATION: (Record p. 698-699)

DEFENSE: Did the making of the movie, based on your own personal observations, in any way affect the morale of VF-84's personnel in one way or the other?

EASTMAN: Yes, sir, I think it affected it in a positive fashion. We were — most of us were — most of the squadron was involved in one way or another, either at Key West or on board the ship, and as a result of this, a certain amount of money had been allocated to be utilized for basically improvements in squadron spaces.

DEFENSE: Well, did you see any improvements yourself in the squadron spaces?

EASTMAN: Yes, sir, and specifically on

board the ship, we had — one of the hardest things to have accomplished is — our enlisted personnel sleep in bunks that are three — stacked three high, and that's not eactly the most private place. So what we accomplished there was: We got curtains for each one of those bunks made of nomex material, which is fire-resistant, something you need aboard ship, and that was — allowed our enlisted personnel some privacy. We had aboard ship also retiled the ready room; we were able to panel it. I believe we put in a drop ceiling. We had a VTR recorder, which enabled us to get the latest movies, and this type of thing, from the states.

DEFENSE: All right, sir. And were those improvements that you've outlined — did they occur during the time period of the movie being filmed?

EASTMAN: To the best of my recollection, yes, sir. ... A lot of these improvements, sir, were made for the movie also. We were utilizing the spaces and we wanted them to look particularly good for the movie itself.

DEFENSE: And during that time, Emory Brown was the commanding officer of VF-84?

EASTMAN: Yes, sir.

DIRECT EXAMINATION: (RECORD P. 840-841)

DEFENSE: Well, were you there when the motion picture was being filmed?

BULICK: Yes, sir. I was in Key West. I was the maintenance officer in charge of the maintenance people keeping the aircraft up.

...

DEFENSE: What can you tell us about anything you observed, one way or the other, about Emory Brown's effforts concerning the welfare and comfort of his men?

BULICK: Well, he had nomex bunk curtains made up for the crew. We redone the ready room on the NIMITZ; we redone the ready room at Oceana; we redone the career counselor's office. ... He brought us — for the ordnance shop, he brought us catalytic heaters and fuel because, in November, the one year, the heat wasn't turned on yet and my people were cold in the space we were in. So he brought those in for us.

DEFENSE: Do you know how he got those or how they were paid for?

BULICK: No, sir, I don't,.

DEFENSE: All right. Do you know of any instances when he paid for things to help the men out of his own pocket?

BULICK: Yes, sir. He bought the fuel for them. I've watched him give the duty driver money to go buy fuel for the catalytic heaters.

DEFENSE: With relation to the movie, do you or did you know at the time, one way or the other, whether the squadron itself would benefit in any way from the fact that they were helping to make the movie?

BULICK: I think that was common knowledge throughout the squadron, that we were going to get benefits from this movie to help fix up the ready room on the ship, the VTR's and stuff like that.

DEFENSE: All right. And did or did not that happen, to your observation, during the time that the movie was being made?

BULICK: Yes, sir, it did.

REDIRECT EXAMINATION: (Record p. 846-848)

DEFENSE: I just ask you this: Mr. Bulick, do you know whether or not, in Key West, besides the photography that the movie production was engaged in, was anybody doing any photography for the squadron?

BULICK: We took a photographer with us...His name is Robinson.

...

DEFENSE: Did you see the skipper do anything at the time?

BULICK: He gave Airman Robinson $200.00 to buy .35 millimeter film, as much as he could get with it.

DEFENSE: All right. And where -- where did you see -- You say he gave him $200.00. How do you know he gave him the money?

BULICK: Because he gave him two $100.00 bills.

DEFENSE: Well, where did he get it?

BULICK: Out of his wallet.

The statement in the Opinion that "the contract between the motion picture company and the Navy did not allow the producer to contract with any Navy personnel for performance of any movie related services" is inaccurate and improperly addresses the actual situation that occurred and the actual statement by the technical adviser, Captain Graves.

The Opinion states that according to the testimony of Navy Project Officers there would be

"no reason for Commander Brown to receive a check from the motion picture producer unless it was destined for the ship's recreation fund in which case Brown should have forwarded it to the Secretary of the Navy" and the statement that "the testimony at trial indicated that Brown did receive such a check and did not forward it" misconstrues the factual situation.

The subject of the check as to reimbursement of expenses was never developed with the witness. The testimony at the trial did not support the contention that Commander Brown did receive such a check destined for the ship's recreation fund. Captain Graves testified that he had prepared a message for release by the Chief of Naval Operations that "the Navy should benefit from the movie in the areas of recruiting, retention, and demonstration of capabilities at sea." Commander Brown maintained that his actions in improving the spaces in his

squadron were in support of morale, recruiting and retention. The trial testimony of officers assigned to his squadron and previously cited fully bears out this contention. Captain Graves stated that he had "tried to stay out of" the subject of appreciation to the squadron by Peter Douglas, as he had "done a half a dozen movies before this one, and when I took the job, I was indoctrinated by an expert about conflicts of interest" (Tr. 186). Captain Graves conceded that such contributions were made by the production company and that by staying out of it, he did not know what agreements were made with the squadron and the ship as to what was going to be done for them in appreciation (Tr. 187). Captain Graves further stated that he did not know whether or not any contributions were authorized by the Secretary of the Navy because he was off active duty when the movie was finished (App. 70b).

CROSS EXAMINATION: (Record p. 186)

DEFENSE: Now you said, Captain that you tried to stay out of the subject of appreciation by Peter Douglas, his showing appreciation to the squadron, or a member of the squadron?

GRAVES: Yes.

DEFENSE: What do you mean by: You tried to stay out of it?

GRAVES: I — this is — I had done a half-dozen movies before this one, and when I took the job, I was indoctrinated by an expert about conflicts of interest, and I did not want to be — or give the impression that anything that I was doing, because my job had a major impact on Navy cooperation on the picture — I didn't want — I didn't want to give the impression that benefits to Navy personnel officially were a consideration that I was involved in either making or being a part of. So I was not really involved in contributions. I like to use the word "donations" that were made to the — to the ship and the squadron after the fact.

DEFENSE: All right. Now, then, what you're saying is that when Peter Douglas did make contributions to the squadron and to the ship, we're talking about the NIMITZ —

GRAVES: Yes.

DEFENSE: I don't want to misquote you. I thought you said that. Didn't you say that you stayed out of contributions to the squadron and the ship?

GRAVES: Yes.

DEFENSE: That's what you did say.

GRAVES: That's what I said.

DEFENSE: They were made by Peter Douglas, weren't they?

GRAVES: The production company.

DEFENSE: All right. And by staying out of it, you really don't know what his agreements were with the squadron and the ship as to what he was going to do for them in appreciation?

GRAVES: That is correct.

COURT: Well, wait a minute. Captain, you testified something about the approval for any donation having to be gotten from the Secretary of the Navy, or somebody.

GRAVES: The donation is made to the Secretary of the Navy in the name of the squadron and he authorizes it to go back to the squadron or ship into their recreation fund.

COURT: And you said that was done in this case?

GRAVES: I cannot say for sure because I was off active duty when the movie was finished, but it's customary; yes, sir.

Captain Graves' statement that he could see no circumstances that Commander Brown would be accepting a payment from Peter Douglas unless he accepted the check that was destined for the recreation fund (App 73) is pure speculation and was never supported in the transcript. His statement that there is no reason for any payment to any navy people by the production company is correct to the extent as to payment for services, but does not address the distinctly different issues of reimbursement for expenses incurred.

There was absolutely no evidence that Commander Brown did not have permission from the Secretary of the Navy or the Chain of Command to accept reimbursement for expenses incurred nor

was it ever shown that he was required to have such permission.

It is respectfully submitted that the Court either misinterpreted or overlooked material facts in the record, and that accordingly there was insufficient evidence to support the defendant's conviction of illegally receiving a gratuity.

IV. THE OPINION OVERLOOKS MATERIAL FACTS IN THE RECORD BY HOLDING THAT THE DEFENDANT MADE A PROFIT FROM THE SALE OF HATCH COVER TABLES AND A NAUTICAL BLOCK LAMP, WHICH FORMED THE BASIS FOR DEFENDANT'S CONVICTION OF THE THREE (3) COUNTS OF CONFLICT OF INTEREST, WHERE THE EVIDENCE WAS THAT THE DEFENDANT MADE NO SUCH PROFIT.

The Opinion incorrectly states that the defendant conceded that he had made some profit

from the sale of hatch cover tables. In so doing, the Court has misconstrued the statements made by the defendant with regard to the sale of the hatch cover tables. Defendant testified that he sold hatch cover tables through Aquarius Gift Shop either: (1) On a consignment basis to the public, for a profit, with 1/3 of the sales price going to the shop and 2/3 to the defendant; and (2) On the basis of a straight non-profit sale to the Navy with the entire sales price being retained by the gift shop and applied toward curtailment of the Navy's account receivable (App. 322-326).

CROSS EXAMINATION: (Record p. 437-445)

DEFENSE: Mr. Rice, I think you testified that there was a consignment basis for some of these tables?

RICE: Yes, sir, that's true.

DEFENSE: All right. Now, there were -- there were some tables that Commander Brown brought to you that were sold to the public, not -- not to anybody in the Navy;

isn't that true?

RICE: That's true, sir.

DEFENSE: Now, is it not true that in those sales, with those sales to persons from the public, there was the consignment arrangement, that is, one-third of the price goes to you, two thirds goes to the Commander?

RICE: This is true.

DEFENSE: All right. Now, it's also true, is it not, that there were some tables placed with you that went to his squadron?

RICE: This is true.

DEFENSE: Now, can you tell us, first of all, how many tables do you recall that you ever sold for Commander Brown, over all the years, to the public? Do you have some general idea?

RICE: I would say there's no more than four.

DEFENSE: All right. An how about to the navy? Do you recall how many tables you ever sold in ten years to the Navy?

RICE: About the same number. Four or five, I would say.

DEFENSE: Now, as to those tables sold to

the squadron, were those sold on a consignment basis or were those -- or was that just a straight sale --

COURT: Now, are you using Navy and squadron interchangeably? Sometimes you refer to tables sold to the squadron; sometimes you talk about tables sold to the navy; and I don't know whether you're using those terms interchangeably.

DEFENSE: I am, Your Honor. I'll make it clear.

RICE: I answered it that way, Your Honor. That's what I thought he meant. The squadron and the navy are the same.

COURT: All right.

DEFENSE: Well, those four or so tables that went to the squadron, what was the arrangement on those? Were you to get two thirds, or did it all go to you?

RICE: It was all mine, sir.

DEFENSE: All right. Now, I'd like to ask you about that. Now, didn't Emory Brown's squadron have an open account, that is, an account with your shop for framing and various things to be done for the squadron?

RICE: Yes, sir, he did.

DEFENSE: All right. Now isn't it a fact that there was money that the squadron owed you as — as a merchant -- as a businessman for doing things that you had done for the squadron?

RICE: Yes, sir, that's true.

DEFENSE: And didn't you understand there was nothing wrong with you doing the framing for the squadron, did you.

RICE: No, sir, there's nothing wrong.

Mr. Russell Rice, a government witness, confirmed this arrangement and the fact that defendant made no profit on any sales of tables to the Navy (App. 163-165 and App. 167-172) and that he actually donated the proceeds from those tables which had a fair market value of $400.00 to $600.00, but were sold for only $145.00 to payment of the Navy's account at his shop.

CROSS EXAMINATION: (Record p. 443)

DEFENSE: Now, the tables that were placed

with you by the Commander and that went to the squadron, isn't it a fact that the money that was paid by the squadron for those tables went entirely to you to take care of the things you had done for the squadron?

RICE: That's true.

DEFENSE: Isn't it true that, as far as you know, Commander Brown didn't get a red cent from the sale of his tables to his squadron?

RICE: I don't know, sir.

DEFENSE: But as far as you know, the purpose of that, was it not, was to take care of the money the squadron owed you for what you had done?

RICE: Yes, sir, that was my understanding.

COURT: It cancelled out an account receivable: is that what you're talking about?

RICE: We had one rolling, yes, Your Honor.

COURT: All right. But two-thirds of the cost of the table went to -- applied to accounts receivable for Commander Brown's squadron; is that right?

RICE: No, sir, it didn't. The two

thirds that — I don't know where the money went, Your Honor, but, again, there were — hatch tables sold in two different ways. In the first situation, I sold my to my customers that came into the store. There was a consignment basis. I got a third and Commander Brown got two-thirds. That's one area. The other area is what he just discussed — I believe I'm right here — is that we — the hatch tables that were sold to the squadron were in payment to the work that I had done for the squadron, and there was no one-third, two-thirds. that was all my money. If I — the squadron — the hatch table that came in through me was in payment for the framing work that I did. There was no consignment basis there, as far as equitable share of one-third and two-thirds. It was a hundred percent.

COURT: I see. So that one hundred percent of what the Navy paid you went to cancel —

RICE: Accounts receivable.

COURT: — Accounts receivable —

RICE: Yes,sir.

COURT: — for the squadron?

RICE: Yes, sir.

CROSS EXAMINATION: (Record p. 445-446)

DEFENSE: All right. Now, what was the price, roughly, if you recall, as to those four or five tables that were sold with the Commander's assistance to the squadron? Do you recall the price -- the purchase price?

RICE: I would say it's around $150.00.

DEFENSE: All right. Now, how does that compare with your understanding of the fair market price at that time for a hatch cover table of that size that would have been going to any other person or any other place?

RICE: I would say the fair market value of a hatch table built the same way was around -- between four and six hundred dollars.

Of particular significance is the testimony of Mr. Rice with respect to the nature of questioning by Special Agent O'Brien in which no distinction was permitted between Navy and consignment sales to the public thereby permitting the illusion that a profit had been realized on sales to the Navy (App. 172-174).

RECROSS EXAMINATION: (Record p. 452-454)

DEFENSE: Mr. Rice, back when you were questioned by the agent back in 1980 about these particular facts, were you asked whether or not there were two separate accounts, an account for the squadron and an account for Commander Brown, or were you just asked about Commander Brown in general?

RICE: Well, in answer to your first question: No, there was no specification as to whether I was getting -- what percentage or not, no.

DEFENSE: All right. Well, what I mean is: isn't it a fact that the agent was asking you the questions and you were answering them? Is that —

RICE: That was true.

DEFENSE: You were not — you were not the one who was giving him all the information? He didn't just say, "Tell me everything you know about Commander Brown and the tables," did he?

RICE: No, sir, he never did.

DEFENSE: He was pointing you in the direction with his questions, wasn't he?

RICE: Yes, sir, he was.

DEFENSE: Now, his questions to you were about Commander Brown and Commander Brown's account with you, weren';t they?

RICE: Yes, sir, they were.

DEFENSE: They were not questions to you about the squadron's account and how that account related to hatch cover tables that were sold with Commander Brown's assistance, were they?

RICE: No, sir.

DEFENSE: Commander Brown had a personal account with your shop, didn't he?

RICE: Yes, sir, he did.

DEFENSE: That was different from the squadron account, wasn't it?

RICE: Yes, sir, it was.

DEFENSE: And as far as you can recall, is it your recollection today in court under oath that the moneys which were gotten from the sale of tables through Commander Boown to the squadron -- those moneys didn't go to take care of Commander Brown's account.

RICE: No, sir, they didn't.

Defendant testified that he told O'Brien he made no profit on the sale of tables to the Navy. O'Brien advised him that the cost of materials would not count and asserted that the defendant then "indicated that he possibly made a profit on some of the tables" (App. 201).

CROSS EXAMINATION: (Record p. 611-613)

DEFENSE: -- About the sales of those tables.

O'BRIEN: Uh-huh.

DEFENSE: He told you that the squadron could get them that way at half the price they could get them from a commercial source, didn't he?

O'BRIEN: That is correct.

DEFENSE: And he told you that he made no profit from them, didn't he?

O'BRIEN: At first he told me that.

DEFENSE: All right, sir.

O'BRIEN: The he told me he did make a profit.

DEFENSE: Well, the reason he told you, as you say, that he made a profit is

that — Well, who pointed out to him that materials would not count for the purchase price? Who told him — Well, "If you say you didn't make a profit, your giving materials doesn't count," who told him that?

O'BRIEN: I told him that.

DEFENSE: I direct your attention to page — well, it's page 12 of your notes —

O'BRIEN: Uh-huh.

DEFENSE: — at the top of the page. Your notes are: "Commander Brown indicated he got no profit from the sale of these tables, but when it was pointed out that materials would not count for the purchase price, he indicated that he possibly made a profit on some of the tables." Is that what happened?

O'BRIEN: That's correct.

This manipulation of facts and semantics to create the illusion of a profit does not comport to a concession by Commander Brown that he made a profit. On the contrary, the testimony of Rice and O'Brien clearly demonstrate an effort by the

Government to bend a situation in which Commander Brown donated his tables to the Navy or was reimbursed only for cost of materials into a profit transaction.

The evidence presented at trial does not support a finding that the defendant made a profit on the sale of any tables to the Navy. On the contrary, he applied his labor in a hobby without payment and supplied his tables to the Navy at no cost or at cost of materials only. Logic would certainly support the contention that this officer was providing a service to the Government for which only the Government profited and that he, therefore, had no financial interest to serve as a basis for conflict of interest. Had Commander Brown purchased the materials in the customary manner through Navy self-help and the constructed the tables and provided them to the Navy, he would have accomplished the same means at the same cost with no possible question

of conflict of interest.

It is, therefore, respectfully submitted that the Court has either overlooked material facts or has misconstrued the evidence with regard to the defendant having made a profit on the sale of hatch cover tables, and accordingly the evidence was insufficient to support his conviction on the three charges of conflict of interest.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the defendant should be granted a re-hearing en banc and that the defendants convictions on the charges as aforesaid should be granted a new trial as to each of the Counts of which he was convicted.

84-890

No. 84-

Office - Supreme Court, U.S.
FILED
NOV 19 1984
ALEXANDER L. STEVAS
CLERK

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

EMORY WORTH BROWN, JR., Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Emory Worth Brown, Jr.
9211 MacSwain Place
Springfield, Virginia 22153
(703) 455-7005
Petitioner, Pro Se

VOLUME III
APPENDIX

VOLUME III

APPENDIX

APPENDIX D

7 December 1983

From: Captain Charles P. SILVIA, USN, 039-22-2624/1310

To: Chief of Naval Personnel

Via: Commandant, Naval District Washington, D.C.

Subj: Report of the Board of Inquiry in the case of CDR Emory Worth Brown, Jr., USN, 498-38-5240

Ref: (a) COMNDW ltr Code 04 1920(6) of 1 JUL 1983
(b) SECNAVNOTE 1920 of 30 MAR 1983

Encl: (1) Verbatim Transcript and Exhibits of subject Board (except transcript for testimony of 13 October 1983 - to be forwarded separately)
(2) Receipt indicating receipt by Respondent of transcript and Exhibits

1. As directed by reference (a), a Board of Inquiry was convened at Headquarters, Naval District Washington, D.C., pursuant to the provisions of reference (b) in the case of Commander Emory Worth Brown, Jr.,

USN. The board met on 22 August, 20 and 21 September and 1, 2, 13, 15, 17, 19, 20, 21 and 22 October 1983 and announced its decision 7 November 1983. Enclosures (1) and (2) are forwarded for your information and action.

2. Commander Brown is currently assigned to Headquarters, Naval District Washington, D.C. He is assigned TAD to Commander Naval Air Systems Command. Excluding his tour as Commanding Officer, Fighter Squadron Eighty-Four (VF-84), which gave rise to these proceedings, his entire career has been marked by exceptional performance and zealous devotion to duty.

3. Subsequent to Commander Brown's tour as Commanding Officer of VF-84, he was

convicted in Federal District Court of three felony counts of conflict of interest and one felony count of accepting a gratuity. This board was directed to determine, in light of these convictions, whether Commander Brown had maintained adequate levels of performance or conduct as evidenced by one or more of five reasons. The board met in closed deliberations and made the following findings on each of the following five allegations:

a. Failure to show acceptable qualities of leadership required of an officer in the member's grade:

The board found no evidence of poor leadership qualities during Commander Brown's tour as Commanding Officer of

VF-84. In fact, evidence presented indicated that Commander Brown was a superior leader. During his tour as Commanding Officer, the squadron received the Clifton Award (as the best fighter squadron in the Navy), the Battle "E", and the Golden Anchor Award.

b. Intentional misrepresentation or omission of material fact in official written documents or official oral statements:

The board found evidence of misrepresentation of facts in certain written documents that Commander Brown submitted on behalf of his squadron. Many supply documents were submitted for items in support of the

film "The Final Countdown" which were never directly used for that purpose. These items, inventoried by the squadron as items bought with movie company funds, are now government property.

c. A pattern of discreditable involvement with military or civilian authorities notwithstanding the fact that such misconduct has or has not resulted in judicial or nonjudicial punishment under the UCMJ:

The board found no evidence, in this case, of discreditable involvement with military or civilian authority.

d. Commission of a military or civilian offense which, if prosecuted

under the UCMJ, would be punishable by confinement of six months or more, and any other misconduct which, if prosecuted under the UCMJ, would require specific intent for conviction:

> The board (sic) found no evidence of misconduct, other than the four civil convictions, that, if prosecuted, would be punishable by confinement of six months or more or would require specific intent for conviction. The board (sic) noted that Commander Brown faced a total of 24 charges in Federal District Court; however, because he was found not guilty of 20 of these charges, they were not considered as offenses by the board (sic).

e. Conviction by civilian authorities or action taken which is tantamount to a finding of guilty, which, if service connected, would amount to an offense under the UCMJ:

> The board (sic) found that Commander Brown has, in fact, been convicted of three counts of Conflict of Interest and one count of Accepting a Gratuity. Evidence presented to the board (sic) supported the claim that Commander Brown did not benefit personally from the sale (to the Government) of hatch cover tables, for which he was convicted of conflict of interest. With regard to the conviction of accepting a gratuity, evidence supported the argument that the money provided to Commander Brown was in

payment for expenses incurred on behalf of the squadron and the movie company. The board (sic) is of the opinion that the payment in no way constituted a gratuity. The board (sic) also questioned why, if the payment was a gratuity, there was no individual charged with giving the gratuity. This was of concern to the board since the case was investigated by the FBI and brought before a Federal District Court only because a civilian was suspected of paying a bribe. However, no one was ever charged with the offense of paying a bribe or the lesser offense of paying a gratuity.

4. The NIS and FBI investigations (Exhibits 41 and 42 of enclosure (1))

were the basis for the government's case against Commander Brown. The board (sic) found these two exhibits, in the absence of other evidence, were very damning of Commander Brown. However, when considered with all relevant facts in the case, the board (sic) found these investigations filled with unsubstantiated allegations, many of which were based on rumor and innuendo rather than on good objective evidence.

5. The position of Commander Brown was that he was, in fact, not guilty of the offenses for which he was convicted and that he expected his convictions to be overturned on appeal. He admitted that he received the check (the alleged gratuity) from the company which produced the movie "The Final Countdown". His

position was that he did receive the check, but that he used it as reimbursement for his own out-of-pocket expenses in the production of the movie and in the performance of his duties to improve and maintain his squadron's spaces. The respondent admitted that his squadron did purchase furniture that he manufactured and which was sold by a merchant, normally on consignment. His position was that the amounts paid covered the squadron's account with the merchant for other merchandise and that no money passed to the respondent. he described these transactions as essentially a donation of furniture to the squadron. the respondent stated that he never realized any personal gain or profit in any of the incidents and never intended to make such gain. His position

was that his intentions were always to improve the morale of his personnel and the readiness of his command and to promote a good public image for the Navy through the movie. Commander Brown stated that he believed that under the Navy Judicial System he would not have been convicted because the true nature of his intentions and responsibilities as a Commanding Officer would have been understood. His position was that the Federal convictions were based on technical concepts of violation of the law which did not consider that he had unselfish motivations and made no personal gain. Commander Brown denied any improper intent in any documents or statements which did not accurately reflect the nature of expenditures and reimbursement. he admitted inaccuracies,

but denied dishonesty. Commander Brown's position was that he displayed the highest levels of good leadership in his unselfish and zealous devotion to the welfare of his subordinates, the combat readiness of the command and the broader goals of the Navy. The evidence presented to the board (sic) supported, in every instance, Commander Brown's version of the events.

6. The board (sic) acknowledges that Commander Brown engaged in questionable activities which were in violation of Navy directives. However, it is believed that Commander Brown is, basically, an honest man who always acted in the best interests of his subordinates and unit organizations. There is no evidence that Commander Brown profited monetarily by

his actions. By using more orthodox procedures the same beneficial results might have been achieved but with much greater expenditure of time and, possibly, greater expense.

Acknowledging that there were improprieties in procedures, it is the opinion of the board (sic) that other Naval personnel involved in this case also did not conform to or act in accordance with general policies governing the conduct of Naval personnel. SECNAVINST 5370.2G, paragraph 5I, states that "Naval personnel who have information which cause them to believe that other DOD personnel have violated a statute or standard of conduct ... should bring the matter to the attention of the appropriate command authority. the

matter thereafter should be brought to the attention of the person concerned, for possible resolution without further command action, unless the command determines that such communication is not likely to remedy the problem or will adversely affect a proper investigation of the matter." It is the opinion of the board (sic) that the Executive Officer of VF-84, when Commander Brown was Commanding Officer, and other officers senior to Commander Brown in the chain of command, did not follow a logical course of corrective action as provided by the guidelines of SECNAVINST 5370.2G, but rather pursued a course of action that ultimately allowed the matter of a lack of inventory custody cards and return of Navy property to the squadron to develop into a case that destroyed a

front-running officer's career and has the potential for needless adverse publicity to the navy.

7. The board (sic) found, by a unanimous vote, that separation for cause is not warranted and recommends that the case be closed.

8. Commander Brown has been provided a copy of this report.

/s/ C. P. SILVIA, CAPT, USN
Senior Member

/s/ J. M. Tamony, CAPT, USN
Member

/s/ T. FIJAK, Jr., CAPT, USN
Member

APPENDIX E

18 U.S.C. 201 provides:

(a) For the purpose of this section:

"public official" means Member of Congress, the Delegate from the District of Columbia, or Resident Commissioner, either before or after he has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of the Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency or branch of Government, or a juror; and

"person who has been selected to be a public official" means any person who has been nominated or appointed to be a public official, or who has been

officially informed that he will be so nominated or appointed; and

"official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in his official capacity, or in his place or trust or profit.

(c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

(1) being influenced in his performance of any official act; or...

Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, which ever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

(g) Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him; or ...

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

18 U.S.C. 208 provides:

(a) Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government, or of the District of Columbia, of any independent agency of the United States, or of the District of Columbia, including a special Government employee, participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or

other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, partner, organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has arrangement concerning prospective employment, has a financial interest -

Shall be fined not more than $10,000, or imprisoned not more than two years, or both.

(b) Subsection (a) hereof shall not apply (1) if the officer or employee first advises the Government official responsible for appointment to his position of the nature and circumstances of the judicial or other proceeding,

application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter and makes full disclosure of the financial interest and receives in advnace a written determination made by such official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee, or (2) if, by general rule or regulation published in the Federal Register, the financial interest has been exempted from the requirements of clause (1) hereof as being too remote or too inconsequential to affect the integrity of Government officers' or employees' services.

APPENDIX F

OFFICIAL REPORTS OF OFFICER FITNESS

NOTE: The narratives of each document appear with emphasis as added by the originator of the report.

SQUADRON COMMAND TOUR (1979-1980)

First Report (1979):

CDR Brown is an exceptional Naval Officer. He was unquestionably the number one Commanding Officer of the nine in this Air Wing. He is intelligent, dynamic, articulate, and a prolific original writer.

His superb leadership traits and expert managerial skills provided FITRON EIGHT FOUR with a Fleetwide reputation for excellence. The squadron, under CDR Brown's guidance and encouragement, actively and aggressively sought challenging missions and with consummate skill, exceeded expectations in every instance. The squadron performed brilliantly during filming of the major motion picture, "The Final Countdown,", which will have great value in Navy recruiting efforts. CDR Brown's talent for organization and innovation were evident as he coordinated, directed, photographed, and flew in the fighter aerial sequences of the movie in an extremely demanding environment.

CDR Brown is an outstanding fighter pilot. He was the number one pilot in the Air Wing in landing grades throughout the deployment. He also joined that exclusive

group of Naval aviators who have made 1000 arrested landings. His patient concern and instructional techniques were directly responsible for his command being either number one or number two in landing grades during 4 competitive periods throughout the deployment. He is a superb tactician with a comprehensive knowledge of fighter tactics and a thorough understanding of the total mix of Air Wing assets and the most effective methods of employing those assets as a team. He led the squadron to the best performance ever recorded in the Fleet Fighter Readiness Program, personally developed an innovative combat air patrol doctrine which has been extremely successful in every test this deployment, and is a regular member of the Air Wing Tactics Board.

CDR Brown's strength as a leader of men is equal, by every standard, to his

ability as an aviator. He is totally involved in all squadron activities from athletics to retention, from safety to advancement, and from PAO to maintenance. The command's success is a matter of record: " Golden Anchor Award" for retention, eight years accident free, winner of a Meritorious Unit Commendation, winner of the Clifton Award, nominated for the Golden Mike Award, 100 percent officer retention for the fifth consecutive year, and outstanding aircraft combat readiness and material condition. These achievements were accomplished in a command climate cited by HRAV (Human Resources Availability Assessment) as the most outstanding ever evaluated, superb morale and employment of human resources.

CDR Brown consistently endeavors to improve his overall knowledge of the Naval profession and his value to the service.

He is qualified as Officer-of-the-Deck Underway, Combat Information Center Watch Officer, Engineering Officer-of-the-Watch, Commander Duty Officer in Port, and is in the final phase of Command Duty Officer Underway and Surface Warfare Officer Qualification. He also participates in a dedicated onboard study program for nuclear reactor engineering and plant operation.

CDR Brown is fully qualified for second command in grade, and is specifically recommended for a Carrier Air Wing. He is most strongly recommended for accelerated promotion to Captain.

88a. CDR Brown's involvement in retention, advancement, morale and the welfare of his men is complete. He is a gentleman who cares about his people and extends his considerable effort in their behalf. The "Golden Anchor Award"

attests to his success.

/s/ CDR R. M. FERGUSON

Second Report (1980):

CDR Brown's performance was superb during this reporting period. He remains number 1 of 9 outstanding Commanding Officers in this Air Wing. During the recently concluded Indian Ocean deployment, his squadron continued to be the leaders in tactical innovation and efficient and effective utilization of flight time. The squadron was named winner of the coveted Clifton Award designating them as the Number One Fighter Squadron in the Navy, for the second consecutive year. Effectiveness in retention and public affairs continued to be superb and were the benchmark for other squadrons in the Air Wing.

CDR Brown was number 2 in the Air Wing

in landing performance over the 9 month period, an outstanding achievement. He also received his final qualification as a Surface Warfare Officer, a remarkable achievement in view of the multitude of other duties and responsibilities associated with command.

CDR Brown has my unqualified support for command of a Carrier Air Wing and accelerated promotion to Captain

88a. Retention is an every day, every man business in VF-84 and the effort is led by the Commanding Officer. Their success is a matter of record and can be attributed to a great extent to the dynamic leadership of CDR Brown.

/s/ CDR R. M. FERGUSON

NAVAL AIR SYSTEMS COMMAND (1980-1984)

First Report (1980):

Commander Brown is a brilliant officer whose unerring judgment, professional accumen and devotion to duty are unsurpassed. He is a true leader, who, as a relatively new Assistant Project Manager for the F-14 Aircraft, is developing rapidly into a foremost Weapons System Acquisition Manager.

Before he could become acclimated to the NAVAIR environment, CDR Brown was selected as the Navy specialist on a Joint Services Air Defense Team sent to Saudi Arabia to upgrade their capability for protecting key petroleum production installations. This assignment was cited for its critical world interest with the Team reporting directly to the Chairman, Joint Chiefs-of-Staff, in consonance with

the Secretaries of State and Defense. CDR Brown was specifically cited for:

* Developing procedures for and coordinating Navy and Air Force C-3 data-link networks.

* Establishing groundwork for USN contingency air support operations including tactical doctrine and procedures for USN support of USAF special purpose aircraft.

* Organizing quick reaction alert fighter procedures and battle management plans for the Royal Saudi Air Force.

* Determining critical zones and attack criteria that resulted in total redirection of the Saudi missile defense system. In addition, he demonstrated the requirement for and established a Saudi Air Defense Advisory Zone and its fighter response boundary.

* Incorporating the Saudi Naval training radar as an operational air defense element resulting in a multi-million dollar savings in assets.

Because of his recent F-14 command experience in the Indian Ocean, participation in planning for the Iranian Hostage contingency operations, expertise in C-3 applications, broad knowledge of missile

defense systems, Surface Warfare qualfication, and expansive fighter operations background, he was extended one month in his assignment to the Saudi Special Regional Air Defense Team. For performance having great national importance, CDR Brown has been nominated for the Joint Services Commendation Medal.

CDR Brown is performing superbly as F-14 Class Desk Offcier. He is an exceptionally competent, versatile and skilled technical manager. His extensive F-14 operational and test pilot experience extending from program initiation has provided an added dimension and invaluable insight in prioritizing requirements in a demanding fiscal environment. His long term association with industry management, engineering and flight test personnel, and depth of program knowledge and experience facilitate lines of communication and

enable positive control of project initiatives. He is uniquely qualified and a leading authority in F-14 aircraft carrier suitability. CDR Brown's flight test expertise in carrier configurations is a vital source of pilot and engineering recommendations. He is developing a computer assisted airplane configuration management program to assess specific impact of proposed engineering changes on all system integration parameters.

CDR Brown is a dedicated team player, who is personable, professional and widely respected by program associates for his composure and ability to approach all situations with logic and objectivity. He adroitly maintains positive control over individual temperaments in meetings involving controversial issues and channels discussion resolutely toward goal attainment. Defense contractors appreciate his

straight-forward approach and sense of responsibility towards Government and industry. He carefully evaluates fiscal funding requirements to ensure optimum expenditure of defense funds while retaining industrial engineering quality and an established base of technical expertise. He is genuinely attuned to acquisition of the best possible product for the Fleet and particularly responsive to Fleet need for continuous program status update. CDR Brown initiated a system safety review message report and expanded technical management manual distribution to include Fleet units. He even installed a telephone recorder system to respond to after working hours requirements.

CDR Brown directed a concentrated effort to reduce travel requirements and minimize expenditure of funds for program associated meetings. His analysis and

revision of technical, program management and system safety review conference schedules and formats has permitted joint attendance by representatives, maximizing meeting effectiveness and reducing meeting directions.

CDR Brown presents an impeccable personal appearance and executive demeanor in military or civilian attire. He is at ease and in control of the situation in the presence of senior Governmental, corporate or military personnel. He has a strong sense of moral courage to articulate in support of strong national defense initiatives and acceptable living standards for military personnel. An avid physical fitness enthusiast, he is currently developing a weight-lifting and gym facility for NAVAIRSYSCOM. Also, he established an extensive professional library for Class Desk Officers to support

self-study in Naval warfare and management theory. He is an eager student of defense systems acquisition theory.

Although I have ranked CDR Brown two of three 1310-designated officers, he ranks four of 13 Class Desk Officers who include nine Commanders and four Lieutenant Colonels. The margin of difference in performance between CDR Brown and the top-ranked Class Desk Officer is paper-thin; notwithstanding the fact that CDR Brown has one year less tenure as Class Desk Officer. Based on my observations of his aggressiveness and potential, I am confident he will rise to even greater performance and distinguish himself and NAVAIR. <u>It is my strongest belief and recommendation that CDR Brown should be selected for Captain ahead of his contemporaries and for Major Program Manager</u>.

/s/ CAPTAIN D. J. TAFT

Second Report (1981):

CDR Brown's performance as the F-14 Assistant Project Manager (Systems and Engineering), or Class Desk, has been outstanding over this four month period. He is a dynamic and dedicated officer in charge of a team of civilian engineers and military officers who are responsible for maintaining the readiness and viability of the Navy's most important fleet air defense system. As the engineering team leader for the F-14, he is responsible for maintaining and improving aircraft readiness as well as conducting the detailed planning for future F-14 modifications.

The following is a partial listing of CDR Brown's activities and is indicative of the breadth and scope of his responsibilities:

* Coordinated engineering preparation for flight test of the advanced technology F-101 derivative fighter engine. This program was completed ahead of schedule and below cost because of CDR Brown's hands-on involvement in planning and program execution.

* Developed a position on future computer/software requirements for the advanced avionics improvement program. He diligently sought the advice and recommendations of a wide spectrum of experts in order to compile a matrix of information from which technical and programmatic decisions could logically be made.

* Headed the engineering investigation of three major aircraft problems which potentially could have led to fleet-wide groundings. His skillful technical assessment, knowledge of fleet operations and aircraft flight characteristics and ability to coordinate with type commander representatives averted major disruptions in fleet operations.

* Directed the entire effort to replace existing F-14 brakes with the new improved carbon brakes. He initiated an innovative certification testing program, chose the most productive contracting options, which included special product warranties, and finally overcame engineering problems leading to a new brake installation in production aircraft eight months ahead of schedule.

CDR Brown is an impessive officer who makes an excellent and lasting first impression. He is outgoing, friendly and exudes confidence. In public appearances, he is an outstanding representative for the Navy. He has been active in public affairs, working with the Smithsonian Air and Space Museum to upgrade the Naval Aviation exhibit. He coordinated Naval air participation in the Experimental Aircraft Association and Explorer Scout National Fly-in. He has also been chosen as a lecturer at the Defense Systems Management College because of his excellent academic background and outstanding presentation abilities.

CDR Brown is a leader in the finest Navy traditions. He motivates and takes care of those who work for him. There is no question in my mind that he will succeed wherever he is assigned. I cannot

recommend him highly enough for positions of increased responsibilities. He is unhesitantly recommended for sequential command, major program manager and accelerated promotion to Captain.

/s/ CAPTAIN J. F. CALVERT

Third Report (1982):

CDR Brown's performance as Assistant Project Manager (Systems and Engineering), or Class Desk, for the F-14 has been truly outstanding. He is an extremely dynamic, personable, and dedicated officer whose judgment and advice I highly value. During this reporting period he has had to perform under pressure of reduced personnel manning and increased workload. Engineering activity is at an all time high on the F-14 with numerous diverse programs requiring his personal attention and

management. He has it all under control. His accomplishments include:

* Personally directing the investigations and resolution of a major structural defect in the aircraft. He coordinated the engineering evaluation and inspection teams and maintained positive control over a potentially serious disruption in the fleet's ability to respond. Because of his efforts there was minimum impact on fleet operations.

* Scrubbing all F-14 technical efforts in order to find funds to complete a high angle of attack and asymmetric thrust flight test program. The results of this testing will expand operational capability and enhance safety and would not have been possible or completed without his personal dedication and drive to find funds.

* Coordinating flight test efforts in support of F-101 Derivative Fighter Engine program. Personally brought program in ahead of schedule and below cost. Provided operational inputs to study involving F-101 configured F-14. Brought study perspective back on track.

* Developed and implemented a unique requirements and priorities document which proved to be an extremely valuable management tool for the program manager.

CDR Brown is without question one of

the top two or three Commanders in all of NAVAIR. He ranks one of six in his competitive category and stands out in any grouping. I consider him one of the officers best suited for increased responsibility whether that be a major project manager or major aviation command. His accomplishments are numerous, his loyalty and dedication beyond reproach. Promote this officer to Captain at the earliest opportunity.

/s/ CAPTAIN J. F. CALVERT

Fourth Report (1982):

CDR Brown is one of the most impressive Class Desk Officers I've had the pleasure to work with. Assigned as the F-14 Assistant Project Manager (Class Desk), this intense and tenacious manager is pressure oriented, capable of handling

extremely high data rates without approaching saturation threshold, and constantly researches alternatives and formulates better approaches. CDR Brown is totally dedicated toward development of the best product for the fleet, based on the cornerstone of affordability and cost-benefit tradeoff. His positive con-trol of ECP's, field station budgeting and flight test programs has already generated maximum results at a savings of over 37 million dollars.

CDR Brown has surpassed other Class Desks in his performance of duty. Some of his unique accomplishments include:

* Aggressively constructed a case for accelerated upgrade of the F-14 as the most affordable alternative for the outer air battle challenge, rather than development of a next generation fighter.

* Engineered and designed the requirements for advanced avionics integration into the F-14, demanding configuration control in weight, power,

cooling and space to provide optimum installation with minimum impact on the airframe and systems.

* Developed and sponsored an exceptional fleet training program to instruct F-14 high angle-of-attack flying qualities and spin prevention technique. His efforts generated a totally different approach to control boundary flight, significantly reducing high angle-of-attack accident rates and enhancing aircraft confidence in this portion of the flight envelope.

Other high visibility issues resolved during this reporting period include afterburner thrust requirements for catapult launch, asymmetric thrust conditions on FORRESTAL Class Carrier number 4 catapult, engine failure effects during section take-off, flight testing of F-14 on developmental ski jump ramp and fire extinguishing modification requirements for the 101 DFE flight test vehicle. In each issue, the Class Desk position prevailed to the satisfaction and acceptance of all interested parties. This resounding

testimony to his exceptionally sound judgment and clear logic is most richly deserved.

CDR Brown has an extraordinarily high energy level. He amassed this impressive level of achievement while completing 33 semester hours towards an MBA degree (3.8 CPI), achieving 6 equivalent semester hours in computer science, qualifying for and beginning law school, instructing in the Technical Management Curriculum at the Defense Systems Managewment College, presenting a series of lectures in conjunction with the Smithsonian Air and Space Museum and the Aviation Historical Society, serving as special advisor in the production of the USS INTREPID Museum film on seapower, and training for marathons.

CDR Brown is truly the epitome of the Class Desk position and the professional Naval officer. He warrants my absolute

strongest recommendation for early promotion and subsequent assignment to sequential operational command or major system program management.

/s/ CAPTAIN G. R. NAKAGAWA

Fifth Report (1983):

Superior Naval officer, inspiring leader and proven acquisition management specialist. Extremely positive approach to all tasking. Has consistently achieved the highest level of professional excellence. Special testimony to CDR Brown's extraordinary loyalty and complete dedication to the Naval service is evidenced by his undaunted brilliant performance of duty despite external pressures which might have easily distracted or deterred a Naval officer with lesser qualities of perseverance, commitment and resolve.

CDR Brown executed his duties as F-14 Class Desk Officer in an exceptional manner setting the pace as a head-and-shoulders performer. His extensive array of achievements include:

* Attained the best engineering based accident rate on record for the F-14 through skilled assessment and prioritization of aircraft deficiencies and direction of rapid and effective corrective action.

* Directed extremely successful programs to resolve critical fleet problems involving structural fatigue, hook point failure and launch bar deformation avoiding almost certain fleet grounding and major operational impact in each instance.

* Generated numerous innovative cost and time reduction techniques to correct production and fleet retrofit problems and to maintain configuration control without pursuing the expensive long-term ECP process.

* Directed the F-14 Avionics Integration Program and Alternate Fighter Engine Program coordinating contractor development efforts; initiating procurement requests, statement of work, full scale development and detailed specification documents; directing critical computer software recoding and development analyses and providing to the

Program Manager the complete engineering base for the F-14D decision.

Of particular note, during this reporting period the Secretary of the Navy selected for the follow-on fighter the F-14D options and computer system architecture developed under the skill and expertise of CDR Brown. As Class Desk Officer responsible for coordinating the extremely difficult matrix of engineering and programmatic inputs in a fiercely competitive evaluation and selection process, he steadfastly maintained fleet interests as the controlling design element. CDR Brown refused to permit internal and external influence to divert his thorough analysis effort which became the basis for the technical aspects of this critical $800 million development program. His foresight will enable the fleet to receive this affordable weapons system which

incorporates emerging technologies for more effective F-14D offensive and defensive operational capability at a significant cost savings.

CDR Brown served with distinction as the Operations Analyst for Strike Aircraft working critical issues of Forward Pass, Advanced Missile Systems, Air Wing Composition, A-6F, VFMX Operational Design Requirements and Criteria, Outer Air Battle and F-14 Block Upgrade. His unique operational background and experience as a test pilot, fighter squadron commander and designated surface warfare officer and his extensive knowledge of the defense systems acquisition process enabled an indepth project analysis and contributed immeasurably to the successful prosecution of the cited programs.

In a display of tenacity and essentially unbounded energy that has

characterized his performance, he accomodated all tasking and responsibilities in a flawless manner while simultaneously executing final requirements for an MBA and completing his third semester in Law School at George Washington University. CDR Brown has continued to serve as an adjunct instructor in Technical Management at the Defense Systems Management College and to lecture on aviation in support of the Smithsonian Air and Space Museum. he is extremely active in his church and is president of his community association.

CDR Brown is an absolute top performer whose command presence, leadership, drive, initiative and professional performance merit my strongest possible recommendation for accelerated promotion and sequential operational command or major system program management

/s/ CAPTAIN G. R. NAKAGAWA

Sixth Report (1984):

Although Commander Brown was ordered for administrative purposes to the Naval District Washington, at the specific request of the Commander, Naval Air Systems Command, he remained in his present billet as Operations Analyst for Systems and Engineering under TDY orders for the entire duration of administrative assignment.

Extraordinary Naval Officer. Placed interests of the Navy before his own under circumstances that would have deterred the ordinary man. In a spirit of exceptional Navy organization support and loyalty, he aggressively pursued his Systems Command billet responsibilities in addition to fulfilling other demanding requirements imposed. He consistently channeled maximum effort toward project tasking at potentially significant personal detriment.

His superior professional performance and continued exceptional contributions to operational readiness distinguish him as a Naval leader of merit and support my strongest recommendation for accelerated promotion and command.

Commander Brown displayed the highest standards of moral courage and dedication to duty in project analysis and execution. His positive and open approach, wide ranging and in-depth operational and systems acquisition expertise and the respect afforded him by his associates enabled him to maintain extremely effective working relations and to efficiently drive to the core of complex issues. His judgment was consistently proven to be sound and his decisions to be thoroughly researched and well founded.

Uniquely qualified as a combat fighter pilot, test pilot experienced in all

tactical aircraft, fighter squadron commander and designated surface warfare officer, Commander Brown provided invaluable experience and expertise to the Analysis Division and was the linchpin in the successful prosecution of the following critical projects:

* VFMX: Navy feasibility investigation of multi-mission aircraft to replace F-14 and A-6.

* F-14 Block Upgrade: Determination of most effective engineering and systems approach to incorporation of avionics, radar and engine upgrades in development of the F-14D.

* VMX: Strike assessment and effectiveness comparison of A-6E, A-6F, F/A-18 Derivative and VMX for Blue Ribbon Panel on VMX.

* Air Wing Composition: Assessment of A-6 and F/A-18 self-escort capability in comparison to traditional dedicated fighter escort in development of most effective air wing mix.

* IRST: Analysis of IR long and medium wave systems to determine most feasible approach for F-14D, F/A-18, EA-6B and E-2C incorporation.

* Advanced Missile System: Assessment of Advanced Missile System and comparison of associated concepts for outer air battle missile. Applied unique operational and engineering background in adapting system to F-14.

In his prior assignment as F-14 Class Desk Officer, Commander Brown had directed the F-14 Avionics Improvement and Re-Engining programs, coordinating contractor development efforts, formulating sensitive computer software recoding and development analyses and providing technical and engineering recommendations relied upon explicitly by the Program Manager for the F-14D decision. During this reporting period, the Secretary of the navy determined the F-14D options and computer system architecture developed under the guidance of Commander Brown to be the logical approach to fighter modernization and directed contract negotiations for the program. Commander Brown's foresight,

moral courage to reject external influence and to drive to the bottom line in fiercely contested technical issues, and his skill in coalescing adversarial interests into a singular goal were major factors in the F-14D Program and will contribute significantly to Fleet realization of a cost effective and highly capable weapons system.

Commander Brown continues to expand his educational base. He extended his MBA program by conducting an independent research study on Navy systems acquisition assessment and costing, and he completed his fourth semester in Law School. He has actively assisted his associates at the Systems Command in establishing advanced degree programs in consonance with the Navy Education and Training Office. In fulfilling his personal commitment to community service, he is active in his

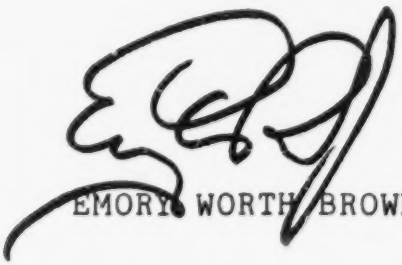
church and serves as President of the Community Association.

Commander Brown is an exemplary leader- stable; dynamic; aggressive; innovative; courageous; decisive. He thrives on pressure, has incredible staying power and adheres tenaciously to his principles. He represents the epitome of the combat commander. A thoroughly professional and superior standout performer, he warrants my strongest possible recommendation for accelerated promotion, sequential operational command and major system program management.

/s/ REAR ADMIRAL L. C. CHAMBERS

NOTE

The Petition for Rehearing submitted as Appendix C has been annotated by adding selected statements from the transcript of the Trial in Federal District Court where so noted in the text. This action was taken to provide continuity and clarity for the reviewer as to the issues developed. In addition, a critical segment was erroneously ommitted by counsel with respect to the testimony of Chief Roger MacCallum. This segment has been added for clarity and noted by the addition of brackets.



EMORY WORTH BROWN, JR.

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CLERK

(5)

No. 84-890

In the Supreme Court of the United States

OCTOBER TERM, 1984

EMORY WORTH BROWN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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12

QUESTIONS PRESENTED

1. Whether the district court correctly instructed the jury that if it found petitioner not guilty of bribery under 18 U.S.C. 201(c), it should consider whether he was guilty of the lesser included offense of accepting a gratuity under 18 U.S.C. 201(g).

2. Whether the district court's instructions on the offense of accepting a gratuity were erroneous.

3. Whether the evidence was sufficient to support petitioner's conviction for accepting a gratuity.

4. Whether the evidence was sufficient to support petitioner's convictions for conflict of interest under 18 U.S.C. 208(a).

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 1

Argument 3

Conclusion 8

TABLE OF AUTHORITIES

Cases:

Henderson v. *Kibbe*, 431 U.S. 145 5

Keeble v. *United States*, 412 U.S. 205 4

Sansone v. *United States*, 380 U.S. 343 4

United States v. *Brewster*, 506 F.2d 62 ..... 4, 5

United States v. *Conlon*, 628 F.2d 150 7

United States v. *Crutchfield*, 547 F.2d 496 4

United States v. *Frady*, 456 U.S. 152 5

United States v. *Harary*, 457 F.2d 471 4

United States v. *Irons*, 640 F.2d 872 7

United States v. *Niederberger*, 580 F.2d 63, cert. denied, 439 U.S. 980 5

United States v. *Powell*, No. 83-1307 (Dec. 10, 1984) 5

United States v. *Raborn*, 575 F.2d 688 4

Page

Cases—Continued:

United States v. *Umans*, 368 F.2d 725, cert. dismissed, 389 U.S. 80 4

United States v. *Williams*, 705 F.2d 603, cert. denied, 464 U.S. 1007 6

Statutes and rules:

18 U.S.C. 201(c) 1, 4

18 U.S.C. 201(c)(1) 3

18 U.S.C. 201(g) 1, 3, 4

18 U.S.C. 208(a) 1, 7

18 U.S.C. 641 1

18 U.S.C. 1001 1

Fed. R. Crim. P. :

Rule 30 5

Rule 31(c) 4

Rule 52(b) 5

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-890

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 1984. A petition for rehearing was denied on September 21, 1984 (Pet. App. 19a-20a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted on one count of accepting a gratuity, in violation of 18 U.S.C. 201(g), and three counts of conflict of interest, in violation of 18 U.S.C. 208(a).[1] He was sentenced to

[1]Petitioner was acquitted on one count of bribery (18 U.S.C. 201(c)), six counts of theft of government property (18 U.S.C. 641), nine counts of making a false statement (18 U.S.C. 1001), and four counts of conflict of interest (18 U.S.C. 208(a)).

concurrent one-year terms of imprisonment, suspended in favor of three years' probation, and fined $5,000. The court of appeals affirmed (Pet. App. 1a-18a).

1. a. The evidence at trial, which is summarized in the opinion of the court of appeals (Pet. App. 2a-10a), showed that petitioner was the commanding officer of a squadron of F-14 fighter planes stationed aboard the U.S.S. Nimitz. In 1979, the Navy entered into a contract with a civilian motion picture company in connection with production of the film "The Final Countdown." The contract provided that petitioner's squadron would fly in certain scenes of the movie and that the Navy would receive $4,000 per hour of flight time for the use of its personnel and equipment. It was petitioner's obligation to document the hours flown for billing purposes. The contract specified that no Naval personnel would be paid for work done on the movie while performing their official functions and that the producer could not contract with any Naval personnel for the performance of services related to production of the movie. *Id.* at 2a-4a.

Although petitioner admitted to an agent of the Federal Bureau of Investigation that he should have charged the producer for 150 hours of flight time, he submitted records showing that his squadron had flown only 32.5 hours, resulting in an undercharge of more than $400,000 (Pet. App. 6a). Petitioner also presented to the producer an invoice from Binnacle Enterprises, petitioner's own table-making business, for "set materials" (*id.* at 5a). The same day, the producer delivered a check for $5,563.48 to petitioner's residence. Petitioner admitted to the FBI agent that the materials were not in fact purchased and that the invoice was "bogus" (*id.* at 5a-6a). Finally, when the producer disputed the Navy's claim for payment of certain administrative expenses, petitioner telegraphed him to urge him to

pay promptly in order to avoid an investigation that might reveal the underbilling for flight time (*id.* at 6a-7a).

b. Petitioner and a former naval officer had established Binnacle Enterprises in 1978 in order to produce and sell tables made from ship hatch covers. On three separate occasions, petitioner used Navy funds to purchase furniture from Binnacle Enterprises, without disclosing to the Navy his interest in the company. Petitioner admitted that he made some profit from the transactions. Pet. App. 7a-10a.

2. Petitioner was convicted on one count of accepting an illegal gratuity for his acceptance of the check from the movie producer and three counts of conflict of interest in connection with the purchases from Binnacle Enterprises. The court of appeals affirmed in an unpublished opinion (Pet. App. 1a-18a). The court concluded that it was proper to instruct the jury to consider the lesser included offense of accepting a gratuity, that the instructions were not erroneous, and that the evidence was sufficient to support the convictions (*id.* at 10a-17a).

ARGUMENT

1. Petitioner contends (Pet. 34-35, 42-44, 45) that the district court should not have given an instruction on the offense of accepting a gratuity under 18 U.S.C. 201(g). Petitioner was charged with accepting a bribe, in violation of 18 U.S.C. 201(c)(1), in connection with his receipt of over $5,000 from the producer of "The Final Countdown." Section 201(c)(1) prohibits a public official from "corruptly * * * receiv[ing] anything of value * * * in return for * * * being influenced in his performance of any official act." The court instructed the jury that, if it found petitioner not guilty of bribery, it should consider whether he was guilty of the lesser included offense of accepting a gratuity in violation of Section 201(g). That Section prohibits public officials from accepting anything of value "for or because of any official act performed or to be performed by him."

Petitioner's argument that he was not on notice that he might have to defend against the gratuity charge is meritless. It is well established that accepting an illegal gratuity is a lesser included offense of bribery and that where a defendant is charged with bribery under Section 201(c) an illegal gratuity instruction may be given. See *United States* v. *Raborn*, 575 F.2d 688, 691 (9th Cir. 1978); *United States* v. *Brewster*, 506 F.2d 62 (D.C. Cir. 1974); *United States* v. *Umans*, 368 F.2d 725, 730 (2d Cir. 1966), cert. dismissed, 389 U.S. 80 (1967); Fed. R. Crim. P. 31(c). As the court stated in *Raborn* (575 F.2d at 691), "when charged under § 201(c), a defendant is on notice that he must defend against the lesser included offense defined in § 201(g)."

Petitioner's argument that the charge was improper because he could not rationally be found innocent of bribery yet guilty of accepting a gratuity[2] is similarly unavailing. The offenses are different in at least two respects relevant here. First, "a higher degree of criminal intent" is required for the bribery offense. *United States* v. *Brewster*, 506 F.2d at 71; see also *United States* v. *Umans*, 368 F.2d at 728-730. The jury could quite rationally have concluded that petitioner lacked the "corrupt[]" intent necessary to convict under Section 201(c) although he had whatever lesser criminal intent, if any, required to violate Section 201(g). Indeed, petitioner has argued throughout this case that he did not act with corrupt intent.[3] Second, bribery " 'makes necessary an explicit *quid pro quo* which need not exist if

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[2]See generally *Keeble* v. *United States*, 412 U.S. 205, 208 (1973); *Sansone* v. *United States*, 380 U.S. 343, 349-350 (1965).

[3]Petitioner's reliance (Pet. 34) on *United States* v. *Harary*, 457 F.2d 471 (2d Cir. 1972), is misplaced, because the defendant there had conceded the existence of specific intent, and so there was, on the facts presented, no rational distinction between the bribery and gratuity offenses. See *United States* v. *Crutchfield*, 547 F.2d 496, 501-502 n.4 (9th Cir. 1977).

only an illegal gratuity is involved.' " *United States* v. *Niederberger*, 580 F.2d 63, 68 (3d Cir.), cert. denied, 439 U.S. 980 (1978), quoting *United States* v. *Brewster*, 506 F.2d at 72. The difference is that a bribe causes the official act to be performed, while an illegal gratuity may be paid "because of" an official act even if that act would have been performed in the absence of the payment (*ibid.*). There was evidence to support such a distinction here: the money was not paid until after petitioner had understated the hours to his superior, and there was no evidence of a prior agreement between petitioner and the producer.[4]

2. Petitioner contends (Pet. 35-40) that the court's charge on the elements of the illegal gratuity offense was incorrect. Petitioner argues that the charge (including a supplemental charge given at the jury's request) failed to distinguish a gratuity from bribery and failed to indicate that the check petitioner received could not constitute "anything of value" if it represented reimbursement for funds he expended. Petitioner did not object to the charge on these grounds at trial; review at this stage is not warranted. See Fed. R. Crim. P. 30, 52(b); *United States* v. *Frady*, 456 U.S. 152, 163 & n.14 (1982); *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977).[5]

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[4]Even if petitioner were correct that the evidence did not leave room for rational distinction between bribery and gratuity, he would not be entitled to relief, since the acquittal of the greater offense would not demonstrate that the jury had found one of the elements of the lesser to be unproved, but could equally be explained by jury lenity. Cf. *United States* v. *Powell*, No. 83-1307 (Dec. 10, 1984).

[5]Petitioner's sole objection at trial to the charge on accepting a gratuity was to the district court's use of the phrase "as a result of" in the supplemental charge (Tr. 1433). The court of appeals correctly rejected this argument, reasoning that the court's phrase was "essentially synonymous" with the statutory language (Pet. App. 15a). The court of appeals also noted that the precise statutory language was used in the district court's original instruction and that petitioner's requested language was an incorrect statement of the law (*id.* at 15a-16a).

In any event, petitioner's contentions are without merit. The district court clearly distinguished the two offenses. It repeatedly stated that bribery involves "the intent to be influenced in some official act" (Tr. 1378; see also Tr. 1377, 1379). It explained that the gratuity offense, however, required only a finding that "as a result of doing that which he was required to do, [petitioner] was given the money and he accepted it" (Tr. 1431). This adequately distinguished the offenses.[6] And while an instruction on the definition of "anything of value" might have been appropriate had petitioner asked for one, the failure to give one surely was not plain error — even if the check reimbursed petitioner, it constituted something of value to him, especially where the producer was not obligated to make the payment.[7] Cf. *United States* v. *Williams*, 705 F.2d 603, 622-623 (2d Cir.), cert. denied, 464 U.S. 1007 (1983).

3. Petitioner's factbound claim (Pet. 32-33, 61-64) that the evidence was insufficient to support his conviction for accepting a gratuity was correctly rejected by the court of appeals (see Pet. App. 14a) and does not merit further review. There was ample evidence on the basis of which the jury could conclude that the payment was made "because of" petitioner's understatement of his squadron's flight hours: petitioner admitted that the invoice was phony (C.A. App. 339); the movie's art director confirmed that no set

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[6]Petitioner's objection is a curious one. Surely he was not prejudiced if the bribery instruction was more favorable to him than it should have been. Nor was he prejudiced if the gratuity charge unnecessarily included additional elements of the bribery offense (which it did not). To the extent that his real objection is to the possibility of a compromise verdict, it is answered by the fact that the evidence supported giving the lesser included offense charge (see pages 4-5, *supra*).

[7]The contract between the Navy and the producer specified that the producer could not contract with Navy personnel for the performance of movie-related services (Pet. App. 4a).

was built with the materials enumerated in the invoice (*id.* at 120-122); petitioner admitted that he asked the producer to make the check payable to Binnacle Enterprises to avoid the appearance of a bribe (*id.* at 197-198); and petitioner telegraphed the producer concerning the need to avoid an inquiry into the reporting of flight time (*id.* at 198-A).

4. Finally, petitioner renews (Pet. 47-56) his argument that the evidence was insufficient to support his conflict-of-interest convictions under 18 U.S.C. 208(a). The court of appeals correctly rejected this argument, noting that petitioner's position "borders on the frivolous" (Pet. App. 16a).

Petitioner's argument is that the statute does not reach his conduct because it contains an implicit exception for de minimis transactions.[8] Section 208(a) prohibits, with exceptions not relevant here, any government officer or employee from "participat[ing] personally and substantially * * * [in a] matter in which, to his knowledge, he * * * has a financial interest." Quite clearly, Congress required only that the official's participation, and not his financial interest, be "substantial[]." Petitioner does not contend that he did not substantially participate in the self-dealing for which he was convicted. His argument that his financial interest in the transactions was required to be substantial as well is belied by the plain language of the statute. See generally *United States* v. *Irons*, 640 F.2d 872, 876-878 (7th Cir. 1981); *United States* v. *Conlon*, 628 F.2d 150 (D.C. Cir. 1980). And contrary to petitioner's argument, there was evidence that he did profit from the sales (Pet. App. 9a; C.A. App. 193-195, 367).

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[8]Here, the three sales were for amounts ranging from $135 to $145.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1985

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No. 84-890

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

EMORY WORTH BROWN, JR., Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITIONER REPLY BRIEF

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TABLE OF CONTENTS

Page

Table of Authorities vii

Argument 1

AS TO THE FACTS IN THE OPPOSITION BRIEF

1. The Brief in Opposition was generated exclusively from the inaccurate and misrepresentative statement of the case as derived in the Opinion of the Fourth Circuit and not from the trial record and compounds the error of unsubstantiated assertions to force the facts and to torture the law into the four corners of the conclusion. The Government continues to make assertions and to cite as evidence in support of the convictions statements that are totally unsupported by and do not appear in the trial record in that:

a. The evidence at trial does not show that the contract between the motion picture company and the Navy specified that the producer would not contract with any Naval personnel for the performance of services related to the production of the movie. In fact, the only contract between the Navy and the motion picture company was for liability in the event of loss of an aircraft. 3

b. The evidence at trial conclusively proves that petitioner received only reimbursement for out of pocket expenditures applied to upgrade squadron ready room spaces in preparation for the motion picture and for other procurements directly in support of the production; that he was not paid for services rendered; and that he did not personally benefit from the reimbursement transaction. The Government disregards the undisputed testimony at trial of numerous officers that construction work was performed in the squadron spaces; that they had actually participated in that work; and that petitioner had paid for most of it from his own pockets as characteristic of and consistent with his career behavior in support of Navy self-help space improvement programs. Instead, the Government misrepresents the testimony of the movie art director that "no set was built," taking it in isolation to support the gratuity charge. . . 5

c. Petitioner did not "admit to an agent of the Federal Bureau of Investigation that he should have charged the producer for 150 hours of flight time" or that he undercharged for flight hours employed in the production and the overwhelming evidence to the contrary, including the testimony of the Commander, Naval Air Forces

Atlantic Fleet, and five other witnesses proves that such an admission would be totally inconsistent with the facts. . . . 9

d. The telegram petitioner sent to the producer was sent in response to a hesitancy to pay motion picture obligations to the Navy; was sent two months after his receipt of the check in reimbursement and not prior to that transaction as inaccurately asserted by the Government; was authorized by the Air Wing Commander and the Captain of the USS NIMITZ; and was directed toward protection of Government interests. 10

e. The "table making business" was clearly a hobby, not a business, as supported by overwhelming evidence on the record and no profit was gained in any transaction with the Government. The evidence clearly demonstrates that petitioner did not "admit that he made some profit" in the placement of nautical tables in his squadron; that he in fact received only reimbursement for cost of materials in consonance with the Navy self-help facilities upgrade program; and that he in fact contributed extensive labor and made unreimbursed personal expenditures in favor of the Government. 11

f. The record bears no evidence

to support the assertion that the petitioner did not disclose to the Navy his interest in hatch cover tables placed in his squadron spaces or that such interest was of the nature requiring disclosure. 12

AS TO THE ARGUMENT IN INTERPRETATION OF THE LAW IN THE OPPOSITION BRIEF

1. The presentation of both the primary and the lesser included offenses as to bribery and accepting a gratuity invites compromise verdict contrary to constitutional rights of due process and, as instructed to the jury in the instant case, improperly compels a finding of guilt as there is no leeway provided for determination that innocent reimbursement of expenditures while performing an official duty does not conform to the elements of the gratuity offense. 13

2. The "official act performed or to be performed" for which the gratuity was allegedly paid as the critical element of the offense was cited as the undercharging of 150 flight hours, an act which is totally inconsistent with the testimony presented; which has been conclusively proven to be nonexistent; and which, therefore, does not support the offense. 14

3. The Government argument with respect to the gratuity offense that petitioner "did not object to the charge on grounds at trial" that it "failed to indicate that the check petitioner received could not constitute 'anything of value' if it represented reimbursement of funds he expended" and, therefore, that review at this stage is not warranted attempts to substantiate a conviction of the defendant on attorney unawareness and to disregard the fact that reimbursement of expenses does not constitute a gratuity. Similarly, the Government argument as to the issue of notice to defend against a lesser included offense does not address the fundamental issue of due process or the fact the critical elements of the offense are not substantiated. 14

4. The Government's analysis as to the distinctions between bribery and gratuity offenses does not address the issues as they arise in the instant case and, in fact, further substantiates petitioner's argument that the charges were improper. 16

5. The government's argument as to the correctness of the jury instructions on bribery and gratuity and giving the jury the lesser included offense concurrent with the principal offense does not

conform to the respected and well founded opinion presented in United States v. Brewster and is specious. 18

6. The Government argument that "even if the check reimbursed petitioner, it constituted something of value to him, especially where the producer was not obligated to make the payment" is an unconscionable attempt to create "something of value" through manipulation of semantics where there is only recovery of expenditures. 20

7. The Government misconstrues petitioner's argument as to the "financial interest" cited in the conflict of interest statute and relies exclusively on the Opinion of the Fourth Circuit citing only the testimony of the FBI case agent in asserting that there was evidence that "he did profit from the sales" when in fact there was overwhelming evidence to the contrary. 20

Conclusion 23

APPENDIX

Notes 1a

TABLE OF AUTHORITIES

CASES CITED — Page

Grassetti v. Weinberger,
408 F.Supp 142 (N.D.C. 1976) . . . 21

United States v. Brewster,
506 F.2d 62, 68 17,18

United States v. Harary,
457 F.2d 471, 477 17

United States v. Evans,
572 F.2d 455, 480 (5th Cir.) cert.
denied, 439 U.S. 870 (1978) 22

STATUTES CITED

18 U.S.C. 201(c) 17

18 U.S.C. 201(g) 20

18 U.S.C. 208(a) 21

18 U.S.C. 208(b) 21

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No. 84-890

Emory Worth Brown, Jr., Petitioner
v.
United States of America

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITIONER REPLY BRIEF

ARGUMENT

Petitioner respectfully requests that the Court review Volume II to the Petition (Pet. Vol. II pp. 21a-97a) which presents the precise language and sequence of testimony from the record. All evidence cited in support of the Government as qualifying

to substantiate the convictions is presented in trial context for review. The Brief in Opposition and the Opinion of the Fourth Circuit are compelling in their mutual assertions as they cite admissions of guilt by the petitioner and pages from the record as evidence; however, there was obviously only limited and isolated review of the record and evidence cited in determination of the fact pattern. Incomplete review and prosecutorial bias is clearly demonstrated by the fact that petitioner did not concede guilt and the only evidence presented in support of the Government was the misrepresented and inaccurately quoted FBI statements.

The Court should be aware that a Navy tribunal was convened to review the convictions as a Government action in continuation of Federal proceedings. The tribunal of senior naval officers had access to

all evidence and witnesses, including documents and officers made unavailable by the Navy for trial. After three months of hearings and deliberations the tribunal issued their report (Pet. Vol. III p. 99a-119a), which asserts specifically that:

> "Commander Brown did not benefit personally from the sale of hatch cover tables, for which he was convicted of conflict of interest." (p. 105a)
>
> "With regard to the conviction of accepting a gratuity, evidence supported the argument that money provided to Commander Brown was in payment for expenses incurred in behalf of the squadron and the movie company ... the payment in no way constituted a gratuity." (p. 106a)
>
> "When considered with all the relevant facts in the case, the Board found these (FBI and NIS) investigations filled with unsubstantiated allegations, many of which were based on rumor and innuendo rather than good objective evidence." (p. 107a).
>
> "The evidence ... supported, in every instance, Commander Brown's version of the events." (p. 110a)

After the conviction, the Justice Department directed the FBI to pursue the

issue as to flight hour undercharges in seeking to recover payments due from the motion picture company. The continuing investigation for the first time generated interviews with squadron pilots who participated in the film and confirmed that the flight hour charges were proper.

AS TO THE FACTS IN THE OPPOSITION BRIEF

1. The Brief in Opposition was generated exclusively from the inaccurate and misrepresentative statement of the case in the Fourth Circuit opinion and not from the record and compounds the error of unsubstantiated assertions to force the facts and to torture the law into the four corners of the conclusion. The Government continues to make assertions and to cite as evidence in support of the convictions statements which the Government knows to be in error; which are inconsistent with trial and subsequent findings; and which are totally unsupported by and do not appear in the record of trial in that:

a. The evidence at trial does not show that the "contract between the motion picture company and the Navy specified that the producer would not contract with any Naval personnel for the performance of services related to the production of the movie." The only contract between the

Navy and the production company was for loss of aircraft liability.

The Government cites the Opinion in misrepresenting facts and mistating the record and is in error in that no such contract existed. According to the Navy Production Officer (Tr. pp. 179-180):

Q And were you the ranking project officer and technical adviser on the film?

A I was the only one.

Q All right. Now, there were no written -- well, were there any written agreements, to your knowledge, between the Navy and any of the production people? ... I'm talking about a contract, an agreement about the things we're talking about, who was to pay what and how they were to be charged. You never signed any written agreements on behalf of the Navy, did you?

A No.

Q And so when you say you participated in negotiations, at least to that extent the understanding and agreement was not reduced to writing, was it?

A Our understandings were not reduced to writing.

The evidence clearly demonstrated that there was no prohibition against having Naval personnel perform services related to the production for which reimbursement of expenses was involved. The entire operation required that Naval personnel perform production related services for which the enlisted men were paid per diem and the Executive Officer of USS NIMITZ accepted a check for the crew from the production for services rendered in further evidence that there was no such contract as asserted by the Government. Even if a contract were tortured into existence, petitioner did not violate provisions alleged by the Government in that he was not paid for services, but was rather reimbursed for expenses (para. 1.b. infra).

b. The evidence at trial conclusively proves that petitioner received only reimbursement for out of pocket expenditures applied to upgrade squadron ready room

spaces in preparation for the motion picture and for other procurements directly in support of the production; that he was not paid for services rendered; and that he did not personally benefit from the reimbursement transaction. The Government disregards the undisputed testimony of numerous officers that construction work was performed in squadron spaces; that they had actually participated in that work; and that petitioner had paid for most of it from his own pockets as characteristic of and consistent with his career behavior in support of Navy self-help programs. Instead, the Government misrepresents the testimony of the movie art director that "no set was built, taking it in isolation, to substantiate the gratuity charge.

In keeping with his responsibility both to the production and to the morale of his men, petitioner reconstructed ready rooms onboard NIMITZ and in the hangar in preparation for filming. Where appropriate as a production charge, he applied his own funds in agreement that he would be reimbursed. Where the renovation exceeded the scope of the production, he applied Navy self-help funds as authorized by the Chief of Naval Operations (Pet. pp. 8, 17-19) . In

addition, he provided other support, in "full cooperation" with the production company, to include purchase of still camera film to chronicle the operation for Navy archives and the company and the purchase of framed squadron prints that were presented to civilian production members. Numerous witnesses confirmed that the transactions were made in the presence and with the approval of the producer with petitioner's own funds (Pet. Vol. II pp. 68a-78a). Navy Chief Roger MacCallum asserted that petitioner paid him by personal check for carpentry in improving squadron spaces (Pet. Vol. II. pp. 69a-74a).

Government assertions that no construction was performed turn on the definition of a "set". Petitioner did not contend that he had constructed a "set" in the connotation of a separate movie set, but that he had renovated ready rooms to be

used as sets for the film. The distinction is of extreme importance as the art director would not have been involved in such activity as it was a government reservation over which he had no control and no authority to modify. Petitioner had no reason for contact with the art director with respect to set construction as the filming was to be on location on NIMITZ or at the hangar, not on a set. According to the art director in brief:

> "A set is a constructed room, landscape, whatever, for the filming of a picture on a sound stage or an exterior location, in case you can't find the actual set." (Tr. p. 345)

> "We could have the NIMITZ to shoot the real thing, rather than build sets. In case NIMITZ was called out to sea and the company would be stuck, waiting in Norfolk till it got back, then the plan was for the company to go shoot the sets that I would design and build in a sound stage or someplace." (Tr. p. 352)

When the art director arrived on location in the ready room, renovation had been

completed. He had a set fully prepared and had no construction requirement. Government manipulation does not counter the overwhelming testimony of direct participants that petitioner had executed the construction projects.

c. Petitioner did not "admit to an agent of the Federal Bureau of Investigation that he should have charged the producer for 150 hours of flight time" or that he undercharged for flight hours employed in the production and the overwhelming evidence to the contrary, including testimony of the Commander, Naval Air Forces Atlantic Fleet, and five other witnesses proves conclusively that such an admission would be totally inconsistent with the facts.

Petitioner never told the agent that he should have charged or that he undercharged the motion picture company for flight hours. Undisputed testimony confirmed that the Navy agreement was for the motion picture company to pay for thirty flight hours; that all other flights were legitimate training charges; and that petitioner conformed explicitly to the

agreement and to the guidance of his superiors. There was no undercharging of flight hours. (Pet. Vol. II pp. 26a-62a). The FBI testimony directly supports petitioner contention that he acted in conformance with Navy guidance in charging for the agreed amount of flight hours.[1]

d. The telegram petitioner sent to the producer was in response to a hesitancy to pay production obligations to the Navy; was sent two months after receipt of the check in reimbursement and not prior to that transaction as inaccurately asserted by the Government; was authorized by the Air Wing Commander and the Captain of USS NIMITZ; and was directed toward protection of Government interests.

The telegram was not produced and no one other than petitioner testified as to the actual content. Government assertions are purely speculative and inconsistent with the facts presented and the Government has confirmation that the officers cited did, in fact, authorize the telegram. (Pet. Vol. II pp. 55a-62a).

e. The "table making business" was clearly a hobby, not a business, as supported by overwhelming evidence on the record and no profit was gained in any transaction with the Government. Petitioner did not "admit that he made some profit" in the placement of nautical tables in his squadron. The record confirms that he received only reimbursement for cost of materials in consonance with the Navy self-help facilities upgrade program and that he in fact contributed extensive labor and made unreimbursed personal expenditures in favor of the Government.

Testimony corroborated the contention that the name "Binnacle Enterprises" was only a means for tracking a separate checking account; that there was no business, either formal or informal, in operation; and that what the Government contended was a "company" was the making of 21 hatch tables in the garage over a five year period, many of which were <u>given</u> to Navy activities. The transactions for which conflict of interest was alleged generated net loss to petitioner and extraordinary gain to the Government.

Petitioner was operating in conformance with the Navy self-help facilities upgrade program and the Chief of Naval Operations objectives in improving appearance of squadron spaces and quality of life of Naval personnel. (Pet. pp. 7-8, 17-21, and Pet. Vol. II pp. 84a-97a).

f. The record bears no evidence to support the assertion that petitioner did not disclose to the Navy his interest in the hatch tables placed in his squadron spaces or that such interest was of the nature requiring disclosure.

Petitioner's hobby was well known by Navy officials as directed toward the benefit of the Navy; his Air Wing Commander personally had a table; the Fighter Wing office and BOQ had tables provided at no cost; and petitioner was cited by the Atlantic Fleet Commander expressly for placing nautical tables in his squadron spaces. (Pet. pp. 17-21).

The transactions did not mandate

disclosure of any financial interest as there is no financial interest in reimbursement for cost of materials.

AS TO THE ARGUMENT IN INTERPRETATION OF THE LAW IN THE OPPOSITION BRIEF

1. The presentation of both the primary and the lesser included offenses as to bribery and accepting a gratuity invites compromise verdict contrary to constitutional rights of due process and, as instructed to the jury in the instant case, improperly compels a finding of guilt. There is no leeway provided for determination that innocent reimbursement of expenditures while performing an official duty does not conform to the elements of the gratuity offense.

The Government notes that petitioner was charged with 20 major counts that were disposed of on acquittal, which included all of the original counts in the information employed to secure prosecution of the case.[2] That a compromise verdict was the ultimate aim cannot be disputed when considered with all relevant facts. The issue is well developed and requires no

further clarification (Pet. pp. 32-42).

2. The "official act performed or to be performed"[3] for which the gratuity was allegedly paid as the critical element of the offense was cited as the undercharging of 150 flight hours, an act totally inconsistent with the evidence on record.

Undisputed testimony of six witnesses on record proves that this act did not occur which eliminates the object of the criminal offense (see p. 9-10, supra, and Pet. Vol. II pp. 26a-55a, 63a-84a).

3. The Government argument with respect to the gratuity offense that petitioner "did not object to the charge on grounds at trial" that it "failed to indicate that the check petitioner received could not constitute 'anything of value' if it represented reimbursement of funds he expended" and, therefore, that review at this stage is not warranted attempts to substantiate a conviction of the defendant on attorney unawareness and to disregard the fact that reimbursement of expenses does not constitute a gratuity. Similarly, the Government argument as to the issue of notice to defend against a lesser included offense does not address fundamentals of due process or the fact the critical elements of the offense are not present.

Petitioner's argument is that he was convicted for a charge against which he

did not defend as a result of attorney unawareness of a vague and obscure statutory provision and that legal precedent must stand on a firmer foundation than one built on Government trickery and misrepresentation or attorney error. The issue from the Government perspective is form over substance. Defendant is deprived of his liberty and property, not the attorney who is responsible for ensuring a complete defense. Would the Government interpret the law similarly if a defendant were innocent of murder charges and carry forward the mandate on a death sentence because his attorney was unaware of the statute and failed to defend against the charge. The cases cited by the Government have not been subjected to review by the Supreme Court. If such is to be the law, then this factor should be considered in the aggregate with the substantial array

of errors, misrepresentations and products of overzealous prosecutorial conduct.

4. The Government's analysis as to the distinctions between bribery and gratuity offenses does not address the issues as they arise in the instant case and, in fact, further substantiates petitioner's argument that the charges were improper.

The Government argues that bribery:

> "makes necessary an explicit quid pro quo which need not exist if only an illegal gratuity is involved" in asserting that "the difference is that a bribe causes the official act to be performed, while an illegal gratuity may be paid because of an official act even if that act would have been performed in the absence of payment."

The argument further asserts that:

> "there was evidence to support a distinction here: the money was not paid until after the petitioner had understated the hours to his superior, and there was no evidence of a prior agreement between the petitioner and the producer."

Assuming, arguendo, that the Government were in fact correct, the bribery charge was meritless and should not have been a jury question. On this Government

theory, only the gratuity charge should have been presented to the jury, not both charges as a shopping list. Brewster[4] is directly on point (Pet. pp. 38-40).

As to the statement that "the act would have been performed in the absence of payment", the argument is convoluted and meaningless. The producer agreed to pay the Navy for only thirty hours. Had the Navy charged the company for flight time required to transfer airplanes to Key West (30 hours), there would have been no allocation remaining for actual filming.

The argument that Harary[5] is misplaced is ineffective. The Government stands by the interpretation that petitioner accepted a gratuity in return for undercharging the production by $400,000. This charge can be nothing less than bribery and requires specific "corrupt intent".[6] The Government cannot color intentional

undercharging of flight hours in return for compensation as anything less than bribery. Petitioner asserts affirmatively that had such been the case, then he should properly have been charged with bribery and not with gratuity.

The only reference to an undercharge for flight hours was the purely speculative FBI statement (see p. 9-10, supra and n.1). Absent an objective element, intent is without substance.

5. The government's argument as to the correctness of the jury instructions on bribery and gratuity and giving the jury the lesser included offense concurrent with the principal offense does not conform to the respected and well founded Brewster[7] opinion.

In addition to his concurrent responsibilities as a squadron commander to prepare the squadron for imminent overseas deployment, petitioner was assigned an official duty to coordinate the filming of a major motion picture and to "provide full

cooperation" with the production company. As detailed (see pp. 7-9, supra), he applied his own funds to reconstruct ready rooms in preparation for filming understanding that he would be reimbursed. The instruction to the jury by the Court read:

> "... that the defendant was given the money as a result of the performance of an official duty that he was required to do or to perform as a Navy officer or that he had been ordered to perform as a Navy officer and that he accepted the money." (Pet. p. 36)

Reimbursement was not noted. Petitioner did accept the money as a result of performance of an official duty as did Navy support personnel and the NIMITZ Executive Officer in accepting payments from the production company as a result of performance of official duties in support of the film. There was no personal gain and no criminal activity; however, were the jury presented with the same instruction, they would have

to convict. The instruction is contoured to color a legal act as a criminal offense.

6. The Government argument that "even if the check reimbursed petitioner, it constituted something of value to him, especially where the producer was not obligated to make the payment" is an unconscionable attempt to create something of value through manipulation of semantics where there is only recovery of expenditures.

The Government argument is specious. Congress could not possibly have intended the interpretation proffered. Reimbursement taken in Government perspective means that an Admiral who pays for a contractor's lunch out of expediency fully expecting and subsequently receiving reimbursement has received "something of value" and is guilty of accepting a gratuity.[7] Petitioner was likewise reimbursed, not paid for services, and the record is devoid of evidence to the contrary. (Pet. Vol. II pp. 63a-84a).

7. The Government misconstrues petitioner's argument as to the "financial interest" cited in the statute and relies in error on the Fourth Circuit Opinion citing

the testimony of only the FBI agent as evidence that "he did profit from the sales" when in fact there was overwhelming evidence to the contrary.

As to "financial interest,"[8] the petition is on point (Pet. 47-56) as to distinctions between conduct that offends the statute and conduct that is "too remote or too inconsequential to affect the integrity of Government officers' services."[9] The Government argues that substantiality applies only to participation in the transaction; however, there must be some minimum standard for defining a financial interest. If there is no profit; if the only gain accrues to the Government; if labor is contributed without compensation; if there is no forseeable potential benefit to the officer; if the transaction is reimbursement for materials procured; then a "financial interest" does not attach. Grassetti[10] specifically applies (Pet. pp. 48-49)

The profit issue is without substance (Pet. Vol. II pp. 84a-97a). In brief, the only evidence cited that a profit was made is the assertion by the FBI agent that:

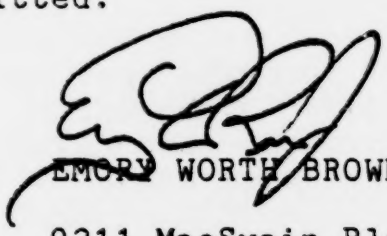
> "Commander Brown indicated he got no profit from the sale of these tables, but when it was pointed out that materials would not count for the purchase price, he indicated that he possibly made a profit on some of the tables." (Pet. Vol. II pp. 94a-95a)

Evans[11] asserts that the purpose of conflict of interest laws is to eliminate clouded judgment by Government officers, preferential treatment, inefficient management and the temptation to act contrary to the best interests of Government. Petitioner's professional record as evidenced by official reports of officer fitness (Pet. Vol. III pp. 120a-153a) belies any of these proscribed elements.

CONCLUSION

The Government in the Brief in Opposition is not responsive to the questions presented or the issues addressed in the petition. The aggregate of errors in the instant case gives rise to grievous violation of Constitutional due process and fundamental fairness. The resultant precedent could be extremely detrimental to Government and military transactions and to intercourse between the Government and the commercial sector. The petition for a writ of certiorari should be granted.

Respectfully submitted.



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APPENDIX

NOTES

[1]Testimony of the FBI case agent as to the petitioner in brief:

> "He indicated that he, on official records, had flown 32.5 hours for the production of the movie; however, he indicated that he could have charged Mr. Douglas for at least a hundred and fifty hours." (p. 27a)
>
> "He carefully reviewed each flight hour and decided to charge the production company only the time actually spent for filming and charge the other flight hours against the allocated hours for the squadron." (p. 28a)
>
> "When he refigured the flight hours spent in support of the movie, he took out such things as the time spent on deck for refueling, the time taken in transit from the base to the area where the filming was done, and the down time while the planes were flying but no actual photographing was taking place." (p. 29a)
>
> "All crew members in the squadron who were involved in the filming of the movie were consulted regarding the hours charged to the movie company and knew that Brown was only charging the movie company for hours spent in filming." (p. 29a)

[2]Petitioner was acquitted on one count of bribery (18 U.S.C. 201(c)), six counts of theft of government property (18 U.S.C. 641), nine counts of making a false state-

ment (18 U.S.C. 1001), and four counts of conflict of interest (18 U.S.C. 208(a)). The theft and false statement counts were rejected by the jury primarily because of the testimony by Commander Robert Brich who had Navy responsibility for control of the equipage for which petitioner was charged; who was available to the Government for interview and who actively sought to bring his evidence to the attention of the Government at the beginning and throughout the investigatory period; and who was never consulted prior to trial. Commander Brich confirmed that petitioner had conformed to all Navy regulations with respect to the equipage; that petitioner had directed the proper inventory and custody of all motion picture related materials; and that he, Commander Brich, personally assumed responsibility for his own failure to execute the direction given him with respect to material accountability. He confirmed that petitioner had never attempted to conceal any materials; that a full inventory was on file both at the command and at the Headquarters of the Commander, Naval Air Forces Atlantic Fleet; that the petitioner had never been directed to return the materials as had been alleged by the proseution; that his possession was temporary and proper; and that the matter of signatures on custody cards was no more than an administrative task awaiting completion. (Tr. pp. 771-815). The Government had no basis to any of the charges levied which substantiates the prosecutorial tactic of excessive delineation of counts to foster a compromise verdict.

[3]18 U.S.C. 201(g).

[4]United States v. Brewster, 506 F.2d 62, 68.

[5]United States v. Harary, 457 F.2d 471, 477.

[6]18 U.S.C. 201(a).

[7]506 F.2d 62, 68.

[8]18 U.S.C. 208(a).

[9]18 U.S.C. 208(b).

[11]Grassetti v. Weinberger, 408 F.Supp 142 (N.D.C. 1976)

[8]United States v. Evans, 572 F.2d 455, 480 (5th cir. 1978).